

No. 134

Supreme Court of the United States.

October Term, 1922.

**HANNAH CANARD BARNETT AND TUCKER E.
BARNETT, Petitioners,**

VERSUS

**W. A. KUNKEL AND THE PRAIRIE OIL AND
GAS COMPANY, Respondents.**

**Petition for Writ of *Certiorari*, and
Brief in Support Thereof.**

**LEWIS C. LAWSON,
MALCOLM E. ROSSER,
JOSEPH C. STONE,
CHARLES A. MOON,
FRANCIS STEWART,**
Solicitors for Petitioners.

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IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1922.

No.

HANNAH CANARD BARNETT AND TUCKER K.
BARNETT, *Petitioners,*

vs.

W. A. KUNKEL AND THE PRAIRIE OIL AND
GAS COMPANY, *Respondents.*

MOTION.

Now come Hannah Canard Barnett and Tucker K. Barnett, by Lewis C. Lawson, Joseph C. Stone, Charles A. Moon, Francis Stewart and Malcolm E. Rosser, their attorneys, and move this honorable court to issue a writ of *certiorari*, directed to the Honorable Circuit Court of Appeals of the Eighth Circuit, to require said court to certify to this court, for its review and determination, a certain cause in said court lately pending, wherein Hannah Canard Barnett and Tucker K. Barnett were appellants, and W. A. Kunkel and the Prairie Oil and Gas Company

were appellees, and now herewith tender their petition for said writ of *certiorari*, and a certified copy of the entire record in said cause, in the Circuit Court of Appeals of the Eighth Judicial Circuit, at Saint Louis, Missouri.

LEWIS C. LAWSON,
MALCOLM E. ROSSEB,
JOSEPH C. STONE,
CHARLES A. MOON,
FRANCIS STEWART,

*Attorneys for Hannah Canard Barnett
and Tucker K. Barnett, Petitioners.*

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1922.

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BARNETT, *Petitioners*,

vs.

W. A. KUNKEL AND THE PRAIRIE OIL AND
GAS COMPANY, *Respondents*.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioners, Hannah Canard Barnett and Tucker K. Barnett, respectfully state to this honorable court, that this action was brought by the respondent, W. A. Kunkel, against several persons, including your petitioners, Hannah Canard Barnett and Tucker K. Barnett, to quiet title to the following described lands, to-wit:

The North Half of the North Half of Section Twenty-one (21), in Township Seventeen (17) North, Range Seven (7) East, of the Indian

Base and Meridian, containing one hundred and sixty (160) acres of land, more or less, as the case may be, according to the United States survey thereof, situated in Creek County, State of Oklahoma.

That your petitioners filed an answer and cross-petition in which they prayed for the cancellation of a deed given by petitioner, Hannah Canard Barnett, under her former name of Hannah Canard, to B. O. Sims, and all subsequent deeds in the chain of title through which W. A. Kunkel claimed. That said cross-petition also prayed that the Prairie Oil and Gas Company be made a party, and that a lease given by Kunkel to said Prairie Oil and Gas Company be cancelled. That the Prairie Oil and Gas Company was thereupon made a party. That at the first trial of said cause, the court sustained objections to all the testimony offered by your petitioners, and rendered a judgment quieting title in plaintiff and dismissing defendants' cross-petition. That said judgment was reversed on appeal, 259 Fed. 394, and the case sent back for trial. That at the trial from which the last appeal was taken, which petitioners are seeking to have reviewed, by this proceeding, the following facts were either expressly agreed upon or established by uncontroverted testimony:

The lands above described were arbitrarily allotted to Mehaley Watson, an enrolled Creek Indian, November 15, 1907. Certificates of allotment of said lands were issued to Mehaley Watson, dated July 27, 1908. Mehaley Watson died in October or November,

1908. Mehaley Watson was a resident of Okfuskee County, Oklahoma, at the time of her death, and died in that county. Mehaley Watson was the illegitimate child of petitioner, Hannah Canard Barnett, and said petitioner was the sole heir of said Mehaley Watson.

Petitioner Hannah Canard Barnett is a duly enrolled full-blood Creek Indian.

Homestead and allotment patents for above described lands were signed by the Principal Chief of the Creek Nation, March 10, 1909, and the patents named Mehaley Watson as grantee. Said patents were approved by the Secretary of the Interior, March 24, 1909, and were recorded March 27, 1909.

On the 22nd of March, 1909, petitioner, Hannah Canard Barnett, executed a deed conveying said lands to B. O. Sims. Said deed was presented to the County Court of Hughes County for approval, and approved by the court the same day, March 22, 1909. No attempt was made at that time to have the deed approved in Okfuskee County. In October, 1909, Sims conveyed said lands and since that date has claimed no interest therein.

On the 27th day of March, 1913, these petitioners made a contract with George C. Crump, an attorney, by the terms of which he agreed to bring a suit to cancel the deed to Sims. This contract was approved by the County Court of Okfuskee County on the same day. Suit was brought on the 31st of March, 1913, pursuant to said contract, to recover said land for petitioner, Hannah Canard Barnett.

On the 17th of June, 1913, application was made to A. P. Smith, county judge of Okfuskee County, at his residence in Okemah, the county seat of Okfuskee County, for the approval of the deed from petitioner, Hannah Canard Barnett, to B. O. Sims, dated March 22, 1909. Said Smith made an order approving said deed. Said order was made at the residence of said Smith and not at the court room or in the courthouse. The order was carried to the clerk's office by either the agent or attorney of Litchfield, the person then holding a deed, and claiming title through the deed to Sims, and was by the clerk recorded. The county judge was ill at the time and unable to go to the courthouse, and died within a few weeks without ever holding court or transacting business at the courthouse, and without ever seeing the order again after he signed it.

Kunkel, one of the respondents, took a deed from Litchfield in May, 1914. The Prairie Oil and Gas Company took a lease from Kunkel the same day he received the deed.

In addition to these uncontroverted facts, petitioners introduced evidence tending to show that petitioner, Hannah Canard Barnett, was induced to permit the application for the approval of the deed to be made to the county judge of Okfuskee County by misrepresentations of her attorney, and particularly his representation that it was to her interest to settle the matter, and his representation that upon a settlement, he, said attorney, would receive Two Thousand Dollars and said petitioner would receive

Two Thousand Dollars; and offered evidence tending to show that said county judge was induced to make said purported order of approval by the same representations; that the representations were not true, and that said attorney actually received Five Thousand Dollars upon the approval of said deed, and that she only received Two Thousand Dollars.

Your petitioners further state that at the trial of said action in the United States District Court for the Eastern District of Oklahoma, and upon appeal to the Circuit Court of Appeals for the Eighth Judicial Circuit of the United States, your petitioners contended:

1. That the purported approval was void because it was not approved by the court having jurisdiction of the settlement of the estate of the deceased allottee, and contended that the purported approval not having been made in open court, and not having been made at the courthouse or any place fixed by law for holding court, was void under the provision of section 9 of the Act of May 27, 1908, entitled "An Act for the Removal of Restrictions From Part of the Lands of the Allottees of the Five Civilized Tribes, and for Other Purposes." (35 Statutes at Large 312.)

2. That said purported approval was void because when the deed was first executed, it was presented to the County Court of Hughes County for approval, and the holder thereof made no effort to present it to any other judge or court, and did not at the time he received the deed intend to present it

to any court except the County Court of Hughes County, because no effort was made to have same approved by the County Court of Okfuskee County, for more than four years, and until long after a controversy had arisen and your petitioner, Hannah Canard Barnett, had brought suit to cancel said deed.

3. That said purported approval was void because it was not presented for approval by B. O. Sims, the grantee in said deed, and because prior to the time the deed was presented for approval, said B. O. Sims had conveyed the land.

4. That said purported approval was void because obtained through the fraud of the attorney of petitioner, Hannah Canard Barnett, practiced both on said petitioner and on the judge whose purported approval was obtained.

Your petitioners state that the District Court of the United States for the Eastern District of Oklahoma decided the first three of the questions above mentioned against your petitioners, and that while he made no specific findings on the fourth contention, held, in effect, that Kunkel and the Prairie Oil and Gas Company were innocent purchasers and that the question of the alleged fraud was immaterial. Your petitioners further state that the Circuit Court of Appeals sustained the lower court as to the first three contentions of petitioners, and further, misapprehending petitioners' position on the question of fraud, held that petitioner, Hannah Canard Barnett, understood what she signed and that there was no fraud, and affirmed the trial court.

Your petitioners state that the construction of section 9 of the Act of May 27, 1908, is a federal question over which this court has jurisdiction, and that this court has not decided the question of who or what constitutes a court within the meaning of said section 9, and that the County Court was made a federal agency for the approval of deeds of full-blood Indian heirs by said section, and that the question of whether the approval was obtained by fraud is a federal question, and that this court has jurisdiction of said questions.

Your petitioners state that the decision of the Circuit Court of Appeals is in effect in conflict with the decisions of the Supreme Court of the State of Oklahoma, in *MaHarry v. Eatman*, 29 Okla. 46; *Tiger v. Creek County Court*, 45 Okla. 701, 146 Pac. 912; *Cochran v. Blanck*, 53 Okla. 317, 156 Pac. 324; *Campbell v. Dick*, (Okla.) 157 Pac. 1062, all of which cases held that the approval must be by the court, as distinguished from the judge of the court.

Your petitioners state that the decision of the Circuit Court of Appeals of the Eighth Circuit is erroneous :

1. Because it held that the approval of the deed by the county judge at a place other than the courthouse, the place provided by law for holding court, was the approval of the County Court.

2. Because it held that the deed could be approved more than four years after it was executed and more than four years after it had been present-

ed to and approved by the County Court of Hughes County.

3. Because it held that the deed could be approved after the grantee, B. O. Sims, had conveyed whatever right and interest he held under the deed, and after your petitioner had brought suit to cancel the deed, and after her contract with an attorney to bring suit to recover the land had been approved by the County Court of Okfuskee County, and after the suit had been brought and the grantee in the deed had disclaimed any interest in the land.

4. Because it held that the purported approval was not obtained by fraud.

A transcript of the record in said cause in said Circuit Court of Appeals is hereto attached and made a part hereof.

Wherefore, Your petitioners respectfully pray that a writ of certiorari may issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals of the Eighth Judicial Circuit of the United States, at Saint Louis, Missouri, commanding said court to certify and send to this court on a day to be designated in said writ, a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals in the action entitled, Hannah Canard Barnett and Tucker K. Barnett, Appellants, versus W. A. Kunkel and Prairie Oil and Gas Company, a Corporation, Appellees, Numbered 5920, on the docket of said court, to the end that said case may be reviewed and determined by this court, as provided by law, and further

prays that the said decision, judgment and decree of said Circuit Court of Appeals be reversed and set aside by this honorable court, and that judgment and decree be rendered cancelling said deed from petitioner, Hannah Canard Barnett, to B. O. Sims, and all subsequent conveyances claiming through said deed, and your petitioners further pray for such other and further relief and remedy as this court shall deem proper.

Respectfully submitted,

HANNAH CANARD BARNETT,

TUCKER K. BARNETT,

Petitioners.

By LEWIS C. LAWSON,

MALCOLM E. ROSSER,

JOSEPH C. STONE,

CHARLES A. MOON,

FRANCIS STEWART,

Solicitors and Counsel for Petitioners.

State of Oklahoma, County of Muskogee—ss:

Malcolm E. Rosser states that he is one of the solicitors and counsel for Hannah Canard Barnett and Tucker K. Barnett, the petitioners named in the foregoing petition for writ of *certiorari*; that he has read the foregoing petition; that he participated in the trial of the action in which writ of *certiorari* is sought in this proceeding, and that he knows of the proceedings had in said case, and that the facts stated in the foregoing petition are true, as he verily believes.

He further states that he makes this affidavit for the reason that said petitioners are full-blood Creek Indians, residing more than one hundred miles from Muskogee, Oklahoma, and in the country away from any railroad or other public line of transportation, and because the time is limited within which to serve notice and file this application for writ of *certiorari*.

Malcolm E. Ross

Subscribed and sworn to before me this *6th* day of October, 1922.

Leal

My commission expires

Berta Gonzales

Notary Public.

Nov 27, 1924

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Point One.

The first question decided was that the purported approval by the county judge at his residence, away from the courthouse, was valid. Section 9 of the Act of May 27, 1908, contains the provision governing the approval of deeds of full-blood heirs. The section is as follows:

“That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee’s land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the

laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided, further*, That the provisions of section twenty-three of the Act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section."

In this connection, we call the attention of the court to section 8 of the same act, which amended section 23 of the Act of April 26, 1906, governing the approval of wills by adding at the end of that section the words: "Or a judge of a County Court of the State of Oklahoma." The use of the word "judge" in section 8, and the word court, in section 9, indicates clearly that Congress intended to distinguish between a court and a judge. It has been the uniform holding of the Supreme Court of Oklahoma, that deeds of full-bloods must be approved by the court.

—*MaHarry v. Eatman*, 29 Okla. 46;
Mullen v. Short, 38 Okla. 333;
Fisher v. McKeemie, 43 Okla. 577;
Cochran v. Blanck, 156 Pac. 324;
Campbell v. Dick, 157 Pac. 1062;
Tiger v. Creek County Court, 146 Pac. 912.

And the United States Court has held the same way.

—*Bartlett v. Okla. Oil Company*, 218 Fed. 380;
Okla. Oil Company v. Bartlett, 236 Fed. 488.

This court, referring to this section, in *Tiger v. Western Investment Company*, 221 U. S. 286, said:

"The obvious purpose of this provision is to continue supervision over the right of full-

blood Indians to dispose of lands by will, and to require conveyances of interests of full-blood Indians in inherited lands to be approved by a competent court."

We contend that the judge cannot be the court and cannot hold court except at the place regularly fixed by law for holding court.

The Circuit Court of Appeals for the Eighth Circuit, in *United States v. Black*, 247 Fed. 942, decided that a county judge could approve the deed anywhere he happened to be in the county, and that an order signed by him wherever he happened to be in the county, and afterwards recorded, was evidence of the approval by the court. The reasoning of the court was that, because the Oklahoma statutes provided that the County Court should always be open for the transaction of probate business, that the county judge was really the court, and in effect held that the court went with the judge. The court said:

"It must be borne in mind that 'the court having jurisdiction of the settlement of the estate' of Sam Lucas was always in session. We have no desire to conflict with, much less to overrule, those cases which draw a correct distinction between a court and the judge thereof, and limit the power of courts to act in vacation; but the law says there shall be no vacation in the County Court in probate matters, consequently the 'court having jurisdiction of the settlement of the estate' of Sam Lucas is always in session. Where? At the county seat or some court seat where there is no judge, or where the judge is, although it be away from the county seat or some court seat? We have concluded the latter is

meant, and that this deed was approved by the County Court when the county judge approved it within the county, and especially so where the order is subsequently entered of record at a court seat, which we understand was done here."

In other words, the court held that the approval must be by the court, but that the court was sitting wherever the judge happened to be.

The decision in the *Black* case was followed by the Circuit Court of Appeals on the former appeal of this case, *Barnett v. Kunkel*, 259 Fed. 394, when we appealed from an order sustaining the demurrer to the evidence, and also on the last appeal from which we are praying this writ of *certiorari*, where all the evidence was before the court.

The decision of the Circuit Court of Appeals defeats the purpose of Congress and opens wide a way for the defrauding of full-blood Indians by designing persons. Under the decision of the Circuit Court of Appeals, the judge of the County Court, as distinguished from the court itself, may approve a deed made by a full-blood Indian while he is in a remote part of the county fishing or while he is at home in a sick bed or at a public dance, a political gathering, or any other place. But a court as distinguished from a judge of the court is open, public, at the courthouse, with the judge upon the bench, the clerk of the court there recording the proceedings, the bailiff in court to perform his usual functions. Under the rules and regulations of the Secretary of the Interior, the United States probate attorneys attend the County

Courts upon approval days and there protect full-blood Indians. Prospective purchasers appear, and there is competitive bidding. This open proceeding at the courthouse furnishes the best safeguard for the wards of the government, and Congress intended that the proceedings should be thus open. As pointed out, the same act provides that wills of full-blood Indians may be approved by a county judge; this for the reason, no doubt, that it is often necessary in such cases for the approving agency to go to the sick bed of an Indian. Every form of fraud and graft known to the worst element of the land buyers will be perpetrated upon the full-blood Indians if these approvals are to be had in secret. Congress had this in mind, and hence expressly declared court approval necessary to the validity of such an instrument. Again and again the Supreme Court of Oklahoma has held in such matters that the conveyance of the full-blood Indian must be approved by the court as such as distinguished from the judge of the court.

This holding by the Circuit Court of Appeals for the Eighth Circuit has unsettled somewhat conditions in the east half of the state formerly the Indian Territory. The question should be decided by this court—is the Supreme Court of Oklahoma right or is it wrong?

It is our contention that notwithstanding the provision of the Oklahoma statute requiring the County Court to be open at all times, it cannot be open except at the places where the law provides for the holding of court.

The Act of May 27, 1908, was passed after Oklahoma was admitted to the Union, and, of course, after the Constitution of Oklahoma had been adopted. The 7th article of the Constitution of Oklahoma creates the judicial department of the state. The 11th section of article 7, so far as it relates to the matter now before this court, is as follows:

“There is hereby established in each county in this state a County Court, which shall be a court of record; * * * The county judge shall be a qualified voter and a resident of the county at the time of his election, and a lawyer licensed to practice in any court of record of the state. The county judge shall be judge of the County Court.”

Section 12 of the same article is, in part, as follows:

“The County Court, co-extensive with the county, shall have original jurisdiction in all probate matters.”

Section 13 is, in part, as follows:

“The County Court shall have the general jurisdiction of a probate court. * * * The County Court shall be held at the county seat, but the legislature may provide for holding sessions of the County Court at not more than two additional places in the county.”

Section 1617 of the Revised Laws of Oklahoma of 1910, which was in force in Oklahoma Territory prior to statehood and brought over into the Oklahoma Statute by the Schedule to the Constitution, provides:

“It shall be the duty of the board of county

commissioners to provide for court room, jail, and offices for the following named officers: * * * They shall also provide the courts appointed to be held therein, with attendants, fuel, lights and stationery, suitable and sufficient for the transaction of their business."

Section 1618 provides:

"The power to rent court rooms shall only extend to such rooms as the court using the same may approve."

Section 1823 is as follows:

"In each county, commencing on the first Mondays of January, April, July and October of each year, except as otherwise herein provided, County Court shall convene at the county seat and continue in session so long as business may require: *Provided*, that said courts shall always be open and in session for the transaction of all probate business in their respective counties."

Section 1828 is as follows:

"The judge of the County Court shall keep his offices at the county seat, in such rooms as the court may provide, and his office shall be kept open at reasonable hours. He shall safely keep all the papers, books and records of his office or relating to any case of business of the County Court or before him as judge thereof, and receive and pay out according to law, any money which by law may be payable to him. The county shall provide for such tables, desks, cases for books of record and other property or furniture required for his office."

In many counties in Oklahoma, there are provisions of law providing for the holding of County

Court at other places in the county besides the county seat. The provision of many of these acts, creating more than one place for holding County Court in a county are similar. The act dividing LeFlore County into three County Court districts is typical. Section 1 of the Act, Session Laws, 1913, page 134, divides the county into three districts:

“Denominated Poteau County Court District, Spiro County Court District, and Talihina County Court District.”

Section 2 designates the boundaries of these districts.

Section 3 is as follows:

“The place of holding terms of the County Court for the Poteau County Court district shall be in the City of Poteau, and the place of holding terms of the County Court of the Spiro County Court district shall be in the town of Spiro, and the place of holding terms of the County Court of the Talihina County Court district shall be in the town of Talihina.”

Section 6 of the act provides for paying the expenses of the county judge to and from Spiro and Talihina (Poteau being the county seat) and further provides:

“The county commissioners of said county are hereby authorized and empowered to provide suitable court rooms and necessary furniture, together with all necessary records for said courts, the expenses of which shall be paid by the county.”

The act creating County Courts in Jefferson County, away from the county seat, contains the following provision:

“All probate cases of appointing administrators, executors or guardians, may be done by the court in either of the said districts, provided that all controversies shall be determined or tried in the district where said guardians, administrators or executors reside.”

We do not find anything in the statutes of Oklahoma that indicates that the County Court or the probate court is a peregrinating institution. We do not believe that the judge could make an order in any probate matter on the train going from one of his places of holding court in the county to another place of holding court in the same county. If he has this power, it is a dead moral certainty that some candidates for county judge at the next election will promise to go into each community for the purpose of transacting probate business arising in that community.

There is every indication in the Oklahoma Constitution and in the Oklahoma Statutes, that it was the intention of the law makers of Oklahoma to require the County Court to be held at some certain place. The word “court” has a definite meaning. It is more than a judge. It is an organization. “A court is a place where justice is judicially administered.” A court is not ambulatory. The County Court could not be held at more than three places in the county. (Sec. 13, Art. 7, Okla. Const.) One of these must be at the county seat and the other two must be fixed by the legislature.

It has been held in many states that a court cannot convene or transact business at any place except

the courthouse. It is true that the Oklahoma Statute does not specifically so provide, but we think that that makes no difference. We think that all of the statutes and the Constitution of Oklahoma imply that the court must be held at some particular place and we think further that if the statutes and constitution did not raise any such implication, that it would be a requirement of the common law. The rule that a court must convene at some certain place is more especially true of a court of record. In contemplation of law what is done in the court of record is recorded at the time it is done. The records should be there. It is not the intention of the law that a judge of a court of record should do some act or make some order and then send word to the person having charge of the records, or even write to that person and tell him what he had done, and order it recorded. The theory of the law is that the acts of the court done in court are then and there recorded by the person having charge of the records.

It is only upon this theory that the records of a court import verity. If a judge sitting at his residence or at some place other than the court room, away from the records, can make orders and direct them to be recorded later, then the theory that the records import verity stands upon a very slight foundation and in practice would lead to very anomalous results.

In *Ex Parte Stevenson*, 1 Okla. Crim. 127; it was held that a judgment could only be proved by the record. Unless a judgment is rendered where the

records are, then its existence will depend on other proof, back of the record. There is no law in Oklahoma authorizing or requiring the judge to sign judgments. *Boynton v. Crockett*, 12 Okla. 56, 61. A paper purporting to be signed by the judge and handed to the clerk by a third party is no proof of anything. Such a document has no legal existence. So far as the clerk is concerned, it is mere hearsay.

As said before, a court is an organization. The County Court is a court of record. It has been the custom from time immemorial to open court by public proclamation. One who has ever observed the impressive ceremony by which this court is declared open for the transaction of business, cannot doubt that the public proclamation of the opening of court is a very important and useful ceremony, and not a mere formal matter. To constitute a court, there should be a place where the court is held by law, the judge should be there, the clerk should be there, and the executive branch of the government should be represented, and public proclamation should be made notifying suitors and spectators that the court is open. It has been almost universally held that a court cannot act at a place other than that fixed by law for holding court.

—*Shold v. Van Treck*, 82 Neb. 99, 117 N. W. 113;

Gamble v. Buffalo County, 57 Neb. 163, 77 N. W. 341;

People v. Piasno, 127 N. Y. Supp. 204;

People v. McWeeney, 259 Ill. 161, 102 N. E. 233, Ann. Ca. 1916-B, 34;

McCune v. Reynolds, 123 N. E. 317;
Williams v. Reutzel, 60 Ark, 155, 29 S. W.
374;
Patton v. State, 160 Ala. 111, 49 So. 809;
State v. Woodson, 160 Mo. 444, 61 S. W. 252.

In the matter of *In re Steele*, 156 Fed. 853 (which seems to have arisen out of an unseemly controversy between two judges as to who had the right to appoint a referee in bankruptcy), Judge HUNDLEY, writing the opinion, said, quoting from 8 Am. & Eng. Ency. of Law 24:

“Both time and place are essential constituents of the organization of a court; that is to say, in order to constitute a court, the officer must be present at the time and place appointed by law.”

This opinion also quotes from *Ex Parte Branch & Co.*, 63 Ala. 384, as follows:

“One of the guaranties of Magna Charta is that the court—the power exercising judicial functions—should not migrate with the king, but should hold its sittings at the place and time fixed and settled.”

In *Eichoff v. Caldwell*, 51 Okla. 217, 151 Pac. 860, the court said:

“The District Court is a tribunal established for the exercise of definite judicial powers, at a designated time and place, and it is clear that the judge presiding over such tribunal constitutes the court in the sense contemplated by law only when performing functions of the court at the time and place fixed by the constitution and statute.”

Aside from any mere technical considerations, to have a thing done in open court is some guaranty of publicity. A court is a public place. When the hearing of an application to approve a full-blood deed is had in court some of the public will probably be present. There will be an opportunity for persons other than those making the application to know something of what is going on. It could happen as it has happened in the State of Oklahoma, that some other person would be present and offer more for the land than had been paid for the deed, whose approval is sought, or it might happen that some person present would make suggestions to the court such as would justify him in refusing to approve the deed. These considerations were probably in the mind of Congress when it made the distinction between the County Court and the judge thereof.

The very facts of this case, in our judgment, show the reason why a court should be required to act at some particular place. The record shows that the judge was sick. A man unable to appear at the courthouse in the same town in which he lives, and a small town at that, is not in a condition to transact business. There is a strong probability that this judge was not attempting to transact any business for himself. He was not in a physical condition to make the necessary investigation and probably was not in a mental condition to act with the best of judgment. He had put aside, apparently, all of his ordinary duties. He was not attempting to discharge the duties of his office except as matters were brought to

him at his house, and in a matter of this sort, where it was especially necessary to exercise judgment and to make an independent investigation, he should not have acted at all. He did not act of his own volition, but because of the insistence and request of the representatives of Litchfield. There was no reason in the world why these representatives could not have waited until the judge was ready to resume his duties in the regular way, or until after his death and the appointment or election of some other person to fill his place.

Point Two.

The second point is that the purported approval by the County Court of Okfuskee County is void because it came too late. The deed was executed in Hughes County, March 22, 1909. It was presented to the County Court of Hughes County and approved by the County Court of Hughes County the same day. No further attempt to have it approved was made for more than four years. We are familiar with the cases which hold that mere lapse of time is no bar to approval by the proper authorities, but we know of no case where the parties submitted the instrument to one authority and treated its action as final, and then after several years asked for the approval of another. In this case, after the approval by the County Court of Hughes County, the grantee took no steps to have the deed approved by the County Court of Okfuskee County. Evidently he considered the matter closed.

Point Three.

After Sims received the deed, he conveyed to another person. Petitioner, Hannah Canard Barnett, contracted with an attorney to bring suit to cancel the deed. The contract was approved by the County Court of Okfuskee County. This constituted a disaffirmance of the deed by her, and an approval of that disaffirmance by the County Court of Okfuskee County. Suit was then brought. It was too late then to ask to have it approved.

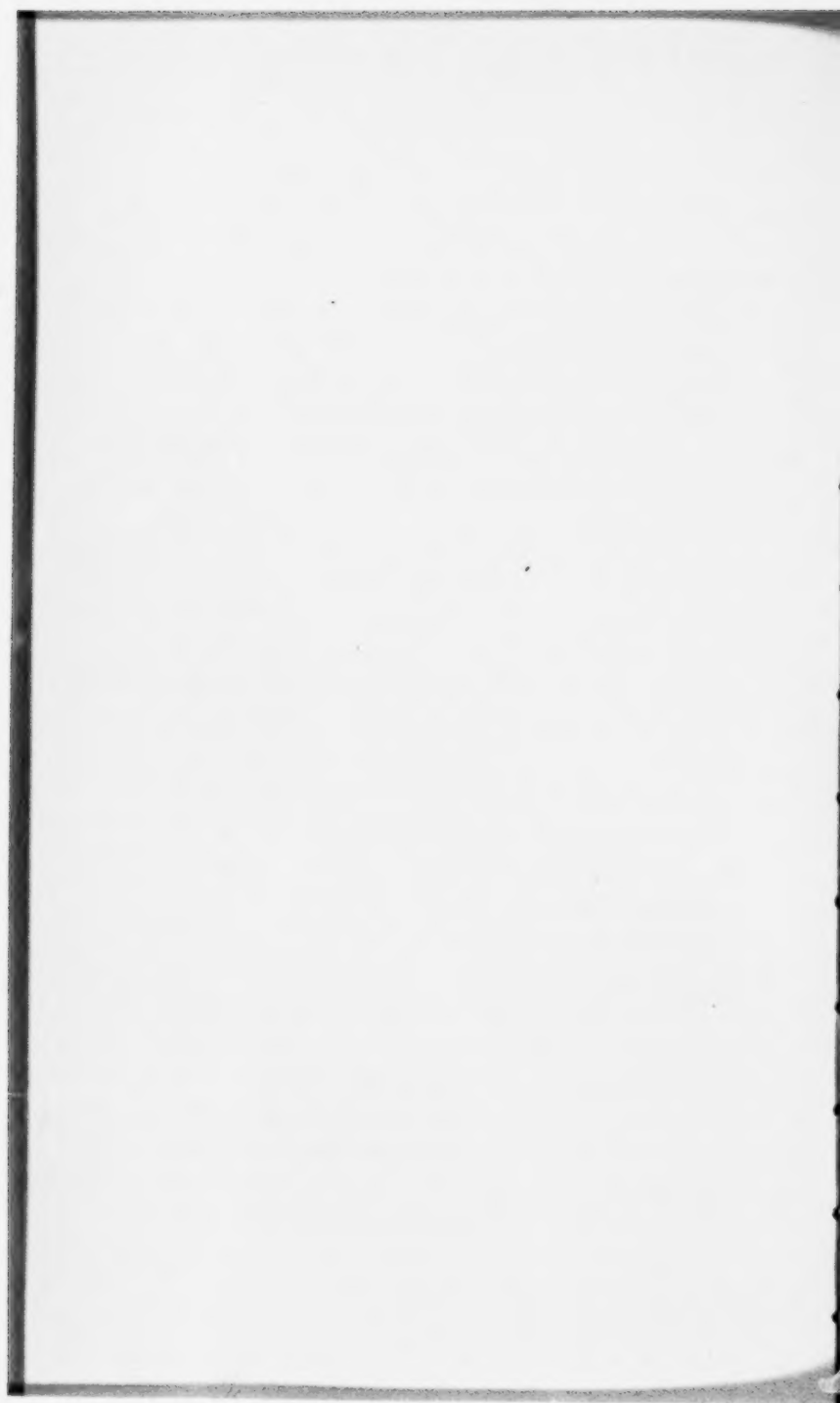
Point Four.

The question of fraud in obtaining the purported approval is a federal question. In approving deeds, the County Court acts as a federal agency. If its approval was obtained by fraud, federal courts could set the approval aside because fraudulently obtained.

It is impossible within the necessary limitation of this brief to argue this question or to state the details of the alleged fraud.

We respectfully request this court to grant the writ of *certiorari* in this case.

LEWIS C. LAWSON,
MALCOLM E. ROSSER,
JOSEPH C. STONE,
CHARLES A. MOON,
FRANCIS STEWART,
Solicitors for Petitioners.



**IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1922.**

No.

**HANNAH CANARD BARNETT AND TUCKER K.
BARNETT, *Petitioners,***

vs.

**W. A. KUNKEL AND THE PRAIRIE OIL AND
GAS COMPANY, *Respondents.***

NOTICE of MOTION.

To Preston C. West, Roger Sherman, A. A. Davidson and James A. Veasey, Attorneys for Respondents:

Please take notice that on Monday, October 23, 1922, at the opening of court on that day, or as soon thereafter as counsel can be heard, a motion for writ of *certiorari*, of which a copy is annexed hereto, will be submitted to the Supreme Court of the United States, at the City of Washington, District of Columbia, for the decision of the court thereon, and that at the same time a petition for said writ, and brief in

support thereof, copies of which are hereto attached, will also be presented to said court.

Respectfully,

LEWIS C. LAWSON,
MALCOLM E. ROSSER,
JOSEPH C. STONE,
CHARLES A. MOON,
FRANCIS STEWART,
Attorneys for Petitioners.

We hereby acknowledge service of the foregoing notice, together with copies of the Motion, Petition for Writ of *Certiorari*, and Brief, referred to in said notice, this 7th day of October, 1922.

PRESTON C. WEST,
A. A. DAVIDSON,
Attorneys for Respondents.

THE
RECORD
OF
THE
COURT
OF
COMMON PLEAS
FOR
THE
COUNTY OF
MIDDLESEX
IN
THE
YEAR
1884

Supplement to the Court of Common Pleas

For the Year 1884

HANNAH CAVENDISH BARNETT AND THOMAS E.
BARNETT, Plaintiffs,

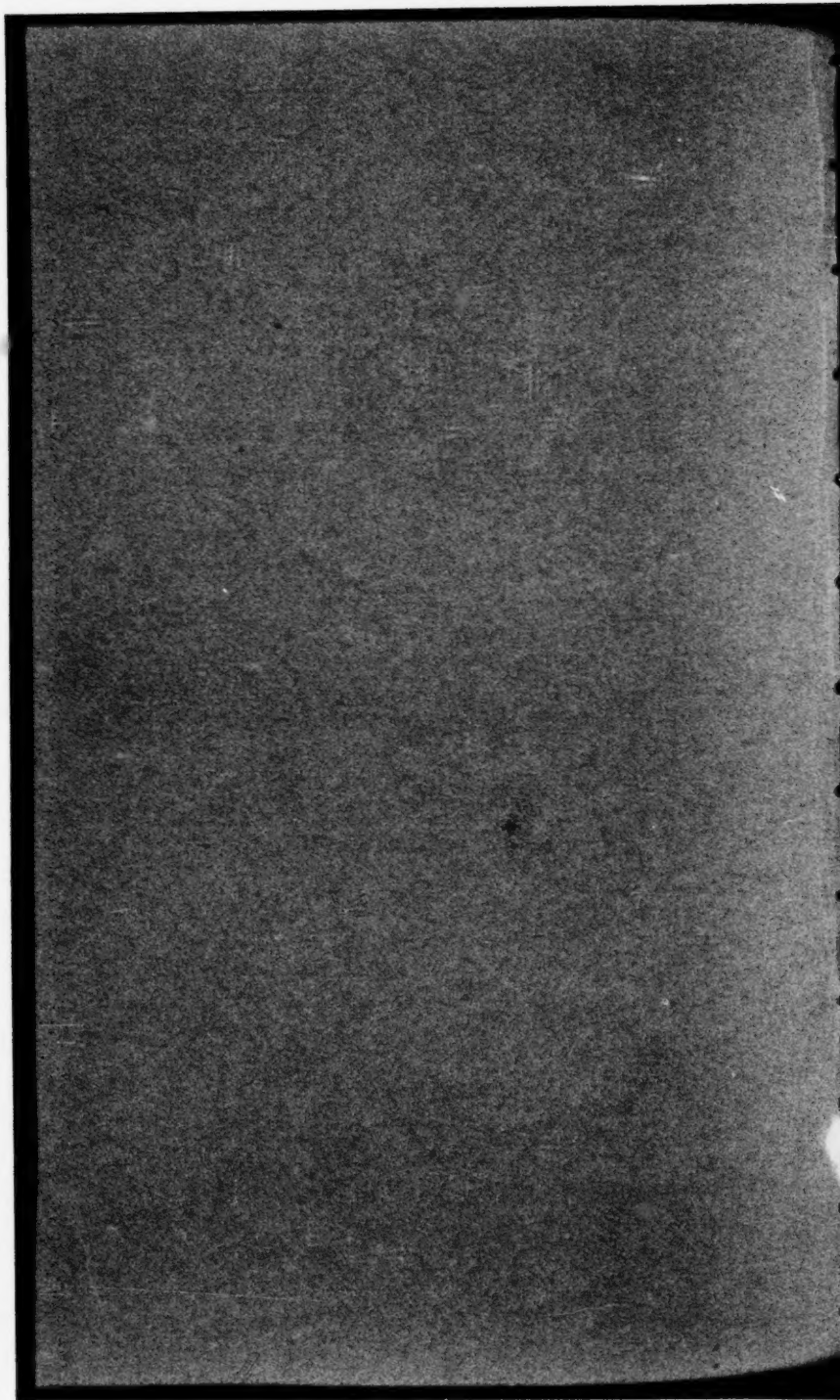
vs.

W. A. KIRKING and the Bank of Montreal,
Defendants.

Appeal from the Circuit Court of the County of
Middlesex for the Term Ending March 1884.

Brief of Counsel for Appellants.

JOHN C. LATIMER,
THOMAS B. WATSON,
Counsel for Appellants.



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Creek citizens; and that Hannah Canard Barnett was a full-blood Creek Indian and owner of said lands under said acts, and the burden of proof herein is governed by section 2126 of the Revised Laws of the United States, which is as follows: "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership".	93

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1923.

No. 134.

HANNAH CANARD BARNETT AND TUCKER K.
BARNETT, *Appellants*,
vs.
W. A. KUNKEL AND THE PRAIRIE OIL & GAS
COMPANY, *Appellees*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF COUNSEL FOR APPELLANTS.

Statement of the Case.

This makes the third appeal taken by appellants in this case, two of which were taken to the Eighth Circuit Court of Appeals; and the first decision therein reversing the trial court is reported in 259 Fed. 394, and the last decision rendered in July 29, 1922, is so short that it is here incorporated in this brief for the convenience of the court, and is as follows, omitting the caption and notation of counsel:

“This is a suit in equity by Kunkel and the Prairie Oil and Gas Company against Hannah Barnett and others, to quiet title to a parcel of land which was formerly the allotment of Mahaley Watson, a full-blood Creek, who died while a minor. Hannah Barnett, a full-blood Creek, was her mother and sole heir. Defendants answered and filed a cross bill praying that title be quieted in Hannah Barnett. At a former trial, an objection was made to evidence in support of the answer and cross bill on the ground that the answer and cross bill did not state sufficient facts. At that time, the court required defendants to make an offer of proof and sustained an objection to that offer. The court then entered a decree for plaintiffs and dismissed the cross bill upon the merits. An appeal from that decree to this court resulted in a reversal (259 Fed. 394) on the ground that the cross bill stated sufficient facts and directing the trial court to hear the evidence thereon. The case was again tried upon full proofs, resulting in a decree quieting the title in the plaintiffs. From that decree defendants bring this appeal.

“Appellants rely here upon 18 assignments of error. Many of these refer to admissions of testimony. These have all been examined and we have found no substantial error therein. Other assignments are directed at the decree itself. The court made no findings of fact and stated no conclusions of law, except the general broad results in the decree, that the plaintiffs had title to the land and that the defendant had no interest therein. The assignments aimed at the decree are sufficient to raise here all questions

of law or fact which the court must have found to justify the decree. Some of the issues so raised and here presented were fully settled on the prior appeal. Such are, that the deed to Sims was void because made before the patent for the land issued; that approval of that deed by the County Court of Okfuskee County could not be made four years after the execution of the deed; that the deed could not be approved by the county judge at his residence. The former appeal settled that the deed could be made before the patent issued; that the deed could be approved at the time it was claimed to have been approved, about four years after the execution of it; and that the approval could be made at the residence of the judge.

“In addition to the points which are above disposed of, there remain two, namely, the alleged fraud in securing the conveyance from Hannah Barnett, and the defense that appellees are innocent purchasers. As the trial court made no findings of fact nor stated any conclusions of law we cannot know upon what theory the decision rested. We have, therefore, been compelled to read and study the entire evidence. The claim of fraud is made by appellants and the burden of proof as to that issue was upon them. The fraud alleged was in procuring the approval of the deed by the judge of the County Court. The fraud consisted in causing Hannah Barnett to believe that the instrument presented to the court for approval was something other than a deed to the property. In our judgment, the fraud alleged was not only not proven but the substantial weight of the evidence is to the contrary. This view of the issue as to fraud disposes of the case and makes it unnecessary

to determine the sufficiency of the defense that the appellees are innocent purchasers.

“The decree is affirmed.

“Filed, July 29, 1922” (as shown on pages 174 and 175 of the transcript).

On this appeal, appellants set forth eight assignments of error and the same are found on pages 177 and 178 of the record. In briefing this case for this appeal it is our purpose to present first, a short brief, condensing the same as much as possible under each assignment of error, and then to supplement the same with a more extensive brief extending into details and a general discussion of the case. In this way the court will be relieved from going into the entire merits of the case unless it so desires to read the more extensive brief. This case involves some of the most important legal features arising in the affairs of these Five Civilized Tribes, and is the first time such features have reached this court for direct decision and for a direct construction of these Acts of Congress relative thereto. As will be seen later these statutes as to the features here involved have been construed in different ways by different courts passing upon the same and, therefore, such matters are not finally settled by any decision of any court of which we have any knowledge. As this is the court of last resort in the construction of these federal statutes concerning these several tribes, the opinion and decision of this court on this appeal will forever settle these questions as a true,

correct and final construction thereof and the various provisions thereof involved in this case. As such matters are of such vast importance and when decided by this court will extend over the entire eastern part of the State of Oklahoma, comprising over 31,000 square miles, and thereby affect the title to such lands and the character thereof involved in this suit, the vast importance of the decision can readily be seen; and as we differ from the decision herein appealed from and the construction of said statutes thereby given, arising under said assignments of error, we feel it is our duty to this court as well as for the benefit of these tribes, to present this case as fully and completely as possible but in the manner above indicated. We differ particularly from the decision of said Circuit Court of Appeals in the following particulars:

First. In holding and deciding that the deed of a full-blood Indian heir for his inherited lands can, under Section 9 of the Act of Congress, approved May 27, 1908, be approved by the judge of the court having jurisdiction of the settlement of the estates of such deceased allottee; and that such approval does not have to be approved by such court to make it valid under said section;

Second. That, as indicated by the trial court in this case whose decision is upheld by said appellate court, such approvals may be made by the county judge of such courts without the presence or participation therein of such full-blood heir and grantor

in such deed; and that, too, anywhere in the county wherein said county judge is elected, as indicated herein and in the decision of said Circuit Court of Appeals in the case of *United States v. Black, et al.*, 247 Fed. 942, and very recently followed by the Supreme Court of Oklahoma in the recent case of *Snell, et al., v. Canard, et al.*, decided on the 10th day of July, 1923, and not yet officially reported;

Third. That in the procurement of a conveyance of restricted lands of these restricted Indians and especially their restricted inherited lands, or in the procurement of the approval thereof under said Acts of Congress, the presence of fraud, deceit or misrepresentation practiced therein either by, against or upon such restricted Indians, or by or upon such County Courts in making such approvals, will vitiate such conveyances, and approvals and render them absolutely null and void, as so held in this case by said Circuit Court of Appeals in its first decision herein and shown in the 259 Fed. 394; and being thus absolutely null and void as so provided in said Acts of Congress, they are not simply *voidable* as is usually the case in matters of fraud, deception and misrepresentation arising in ordinary transactions between persons *sui juris*; and that, under such circumstances, the title, neither legal nor equitable, of such restricted lands embraced in such conveyances is ever conveyed thereby or the Indian heir divested thereof or the restrictions thereon thereby removed; but such lands remain thereafter

fully vested in such heir with all the restrictions thereon in full force and effect the same and in the same condition as before any attempted conveyance thereof;

Fourth. That, where fraud, deceit or misrepresentation is present or enters into such conveyances or approvals as indicated in the third proposition above given, the doctrine of *bona fide* or innocent purchaser has no application whatever to such Indian matters, as such title to such lands cannot be conveyed thereby and such Indian heir cannot thereby be divested of his legal right and title therein nor can the restrictions thereon be thus removed under or by such methods or practices;

Fifth. That the plea of being innocent purchasers in this case set up by said defendants in error has no application whatever in this case, *first*, because of the presence of fraud, deception and misrepresentation disclosed in the record of this case; and, *second*, because when this deed of Hannah Canard Barnett to B. O. Sims, was executed on the 22d of March, 1909, the legal title thereto had not passed to or been vested in her on said date, but remained in the government and Creek Nation until the patents for said land were executed and then recorded by the department, as made and provided in section 5, of said Act of Congress, approved April 26, 1906, and which said patents were not so recorded until March 27, 1909, as conclusively shown by the record. The legal title thereto not having vested in or

held by said Hannah Canard Barnett when said deed was executed but was afterward acquired by her on the recordation of patents on March 27, 1909, her *after-acquired* legal title thereto did not pass or vest under said previously executed deed, as so held by this court in *Starr v. Long Jim*, 227 U. S. 613, 57 L. ed. 670; *Monson v. Simonson*, 231 U. S. 341, 58 L. ed. 260; *Franklin v. Lynch*, 233 U. S. 269, 58 L. ed. 954; *Mullin v. Gardner*, 250 U. S. 590, 63 L. ed. 1158; and *Okla Oil Co. v. Bartlett*, 236 Fed., at pages 494 and 495; and the fact that said section 5 holds the legal title to such lands in abeyance until such patents arising thereunder (which included the patents in the case at bar), should be recorded as therein provided, is a matter of such legal force and significance that this court observed and adhered thereto in the case of the *United States v. Franklin K. Lane*, 220 U. S. 6, 57 L. ed., at page 712, holding and indicating that under said section 5, the legal title to lands thereunder patented did not pass or vest until the same were recorded as therein directed. Therefore said Sims never acquired, and Hannah Canard Barnett never at any time conveyed, the legal title to said lands and, therefore, neither the appellees nor any of their previous mesne grantors ever acquired such legal title and the same still remains to this hour vested in the appellant, Hannah Canard Barnett. Without such legal title being thus vested in said appellees they could not possibly be innocent purchasers and such doctrine

can have no application whatever to them or to their interest in said lands, as held and decided by this court in *Hawley, et al., v. Diller*, 178 U. S. 476, 44 L. ed. 1161; citing many other decisions of this court, and cited and followed again in *Lowe v. Fisher*, 223 U. S. 95, 56 L. ed. 364, and *Wright-Blodgett Co. v. United States*, 236 U. S. 397, 59 L. ed. 637, and holding that the burden of proof of being an innocent purchaser was on him who plead it. See also, *Barnett v. Kunkle*, 259 Fed. 400. Said appellees and none of their previous grantors ever having acquired the legal title to said lands but the same all the while and at the present time being thus vested in Hannah Canard Barnett, said appellees under no legal aspect whatever could ever be innocent purchasers; and therefore their pleas of this doctrine were inapplicable and wholly unavailing.

BRIEF and ARGUMENT.

FIRST ASSIGNMENT.

In holding and deciding that the trial court in said cause made no substantial error in admitting the testimony embraced in the eighteen assignments of error, and particularly that part or portion thereof pertaining to the deed to Sims, dated March 22, 1909, and the alleged approval thereof on the 17th day of June, 1913, by the judge of the County Court of Okfuskee County, State of Oklahoma.

In its opinion the Circuit Court of Appeals reviewed and passed upon the eighteen assignments of error assigned in that court; and found no substantial error therein and at the same time held that such assignments were sufficient to raise in that court all questions of law or fact, which the trial court must have found to justify the decree. Therefore, we presume, the eighteen assignments are also involved before this court on this appeal under this first assignment, and will be found discussed in the supplemental brief herewith. We will then, under this first assignment, call the attention of the court simply to the admission in evidence of this *Sims deed of March 22, 1909*, and *said alleged approval of June 17, 1913*, both of which we maintain were inadmissible in evidence in this case on behalf of said appellees. As the question of the validity of these two instruments and their admission in evidence were of such vital importance to the appellants in this case, we wrote out our particular objections thereto and submitted them on the trial of this case as so prepared, and the same were admitted but overruled by the trial court, to which appellants excepted. These written objections may be seen on pages 72, 73, 74 and 75 of the record. There are nine distinct objections thus given to their admission in evidence, and the same were supplemented in different ways, and the same objections were interposed by appellants to the introduction of the books of the clerk of the County Court of Okfuskee County, and

to any entries made therein pertaining to said approval, as may be seen in different parts of said record extending from page 70 to page 84, and discussed and referred to more minutely in our supplemental brief herein.

As Mahaly Watson was a minor of tender years when she died in October or November, 1908, her right to an allotment and the allotment involved herein arose under this Act of Congress approved April 26, 1906, and its alienation is governed by that act and by the later Act of Congress of May 27, 1908, in the hands of both Mahaly Watson and her mother, Hannah Canard Barnett, as her sole heir. These lands seem to have been arbitrarily selected in November, 1907, and certificate given July 28, 1908. As heretofore stated, her mother undertook to execute to Sims a deed, on March 22, 1909. But she alleges in her petition that it was intended to be for the allotment of her deceased father, Hully Canard, and did not discover that the deed was for the allotment of her deceased child until long after its execution, whereupon she employed one, George C. Crump, as her attorney, to recover said allotment of her deceased child and thereupon the legal proceedings mentioned in the record were on March 31, 1913, instituted for such purposes. This feature of the case will be fully discussed in the supplemental parts of this brief. For the present, and to show the invalidity of said deed and said alleged approval as evidence in this case on behalf of appellees, we will here discuss that feature alone. That matter,

and virtually the merits of the whole case, arise principally out of section 5 of this Act of April 26, 1906, and section 9 of the Act approved May 27, 1908, which respective sections are for the convenience of the court here set out *in haec verba*:

"*Sec. 5. (Act of April 26, 1906.)* That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive same: *Provided*, the provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this Act."

"*Sec. 9. (Act of May 27, 1908.)* That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land. *Provided*, that no conveyance of any interest of any full-

blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee. * * * "

Here by said section 5, it will be observed, "that all patents or deeds to allottees in any of the Five Civilized Tribes to be *hereafter* issued shall issue in the name of the allottee;" and then, "if any such allottee shall die before such patent or deed becomes effective" (that is before such patents are recorded as in said section directed and which involves this case and this allotment, then), "the title to the lands described therein (the patent), "shall inure and vest in his heirs." Here is the emphatic provision that if the allottee dies before the patent becomes effective by recordation, as in said section provided, the lands shall inure to and vest in such heir under and as provided in this section. And as the patents in this particular case were neither issued nor recorded until after the death of Mahaly Watson, as shown by the record, and were not recorded as therein directed until March 27, 1909, the same did not convey the legal title until so recorded, and such patents did not "*inure to and vest in (her) heirs,*" at any time "before such patent or deed became effective," and did not become effective until so recorded, on March 27, 1909. Hence, Hannah Canard Barnett, as such heir, had no "*title*" to such lands, neither did said Mahaly, until said patents were so recorded. Hence, it further follows as ir-

resistible under this section that on March 22, 1909, when she executed said deed to Sims, Hannah Canard had no title whatever to said lands; most certainly she did not then have the legal title thereto and therefore could not convey it as heretofore stated. To this it may be said that under section 22 of said Act of April 26, 1906, a provision is made whereby adult heirs may sell and convey inherited lands, under that provision thereof wherein it is provided:

“That the adult heir of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe in which he or she belongs or belonged, may sell and convey lands inherited from such decedent * * *. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.”

But we insist this section can not apply in this case, *first*, because when said act was passed the allotment in this case had not been either selected or patented, the same being selected in November, 1907, and fully patented on March 27, 1909, although dated March 9, 1909. This was after the Act of 1908 had taken effect, on May 27, 1908, and therefore said act displaced or repealed said section 22 and substituted section 9 as to the manner of conveying said allotment; and, *second*, because no attempt whatever was ever made to convey said allotment

under said section 22 or while it was in force, but attempted to convey the same under said section 9 of said Act of May 27, 1908. Hence, in no sense of the word do we think that this attempted conveyance comes under or is aided by said section 22. In *Harris v. Bell*, 254 U. S. 103, 65 L. ed. 159, at page 164, this court held this Act of Congress of May 27, 1908, to be prospective. On the same principle the quoted part of said section 22 of the Act of 1906, has reference to the past and referred to cases where allotments prior to the passage of said act had been selected or the patents delivered and therefore retroactive. Hence, it can not apply in this case. But the nature and character of the estate in the allotment here involved was fixed and is determined by said section 5 of that act, and held the title to this allotment in abeyance and from vestiture until said patents were recorded as therein directed. It is admitted by appellees and shown in this record that Hannah Canard Barnett is a full-blood Creek Indian woman and so enrolled. Hence, said allotment coming to her in any aspect of the case was restricted under said Acts of Congress; that the death of Mahaly Watson did not remove the restrictions on said lands as to her full-blood mother and heir to her estate, as so held by this court in *Parker v. Richards*, 250 U. S. 235, 63 L. ed. 954, and again amplified in the above decision of *Harris v. Bell*. Hence, as said lands were restricted under said Acts of Congress in the hands of Hannah Canard Barnett; and, inas-

much as she had no title to said lands on the 22nd of March, 1909, at the time she attempted to make said deed, her attempt to execute the same was therefore in open violation of said Acts of Congress and particularly in violation of section 5 of said Act of May 27, 1908 which is as follows:

“Sec. 5. Conveyance, etc., of Restricted Lands Void. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this act shall be absolutely null and void.”

—*Groom v. Wright*, 30 Okl. 652, 121 Pac. 215;

Bell v. Cook, 192 Fed. 597;

Muskogee Land Co. v. Mullins, 165 Fed. 179,
91 C. C. A. 213, 16 Ann. Cas. 387;

Alfrey v. Colbert, 168 Fed. 231, 93 C. C. A.
517;

Barnsdall v. Owen, 200 Fed. 519, 118 C. C.
A. 623;

Chapman v. Siler, 30 Okl. 714, 120 Pac. 608;

Starr v. Long Jim, 227 U. S. 613, 57 L. ed.
670;

Franklin v. Lynch, 233 U. S. 269, 58 L. ed.
954;

Mullin v. Gardner, 250 U. S. 590, 63 L. ed.
1158.

These are Indian cases and arising under these Indian treaties, and the point here desired to be emphasized is that these restricted Indians are *non sui juris* and the provisions of these various acts regulating the alienation of their restricted lands are for their protection and must be obeyed, and any violation thereof is *absolutely null and void*, as so declared in these Acts of Congress and in said decisions, and are not simply *voidable*. Congress has plenary powers over these restricted Indians and their restricted lands, *Lone Wolf v. Hitchcock*, 187 U. S. 556, 47 L. ed. 299, and these acts being for their protection and benefit, any violation thereof is against public policy as well as in violation of such express provisions of such acts. Hence, such violations are absolutely void and not susceptible of ratification, *Okla Oil Co. v. Bartlett*, 236 Fed. 488; and the doctrine of estoppels and innocent purchaser has no application thereto but the same are utterly void because contrary to public policy and in violation of said express provisions of such acts. *Starr v. Long Jim*; *Franklin v. Lynch*, *supra*, in which latter case this court held, in substance, that such Acts of Congress were notice to the world of their provisions and those dealing with such restricted lands of these Indians did so at their peril.

This section 5 thus provides that any *attempted* alienation or conveyance by *deed*, etc., of such restricted lands *prior to the removal of the restrictions therefrom*, either *before or after* said act, shall be

“*absolutely null and void.*” Hannah Canard Barnett being a full-blood Creek Indian and so enrolled and said allotment being thus restricted, and she not having acquired the title to said allotment or, at least, the legal title thereto, could not, and did not, convey the same under said deed to Sims of March 22, 1909. But under said acts and the above decisions said deed was absolutely null and void, and was not susceptible of ratification or subject to the rule of estoppel, laches or statute of limitations, *Kendall v. Ewert*, 259 U. S. 139, 42 Sup. Ct. Rep. 444, 66 L. ed. 862; *Starr v. Long Jim*, *supra*; and Hannah Canard Barnett being *non sui juris*, and said deed having been taken in violation of said acts and therefore against public policy, the same will not be enforced, *Sage v. Hampe*, 235 U. S. 99, 35 Sup. Ct. Rep. 94, 59 L. ed. 147; *Starr v. Long Jim*, *supra*; and *Goodrum v. Buffalo*, 162 Fed. 817-27; R. C. L. 27, Sec. 440; *Hull v. Louth*, 109 Ind. 315, 58 Am. Rep. 405; *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. 837, and Sec. 16 of Supplemental Creek Agreement, providing, “Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph *shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity;*” and section 19 of said Act of April 26, 1906, wherein it provides: “And every deed executed before, or for the making of which a contract or agreement was entered into *before the removal*

of restrictions, be and the same is hereby, declared void."

But to all this it may be argued by appellees that in its first decision in this case reported in 259 Fed. 394, the Circuit Court of Appeals held adversely to these contentions and authorities and held that said deed conveyed the title, etc. But in that decision said Circuit Court of Appeals seems to have been imbued with the notion that under section 9 of said Act of May 27, 1908, death of the allottee removed all restrictions from said deceased allottee's lands, as that part of the section is quoted in that part of said decision of said court, and in support thereof cites the decisions of this court of *Mullin v. United States*, 224 U. S. 458, 32 Sup. Ct. Rep. 544, 56 L. ed. 841; *Duncan Townsite Co. v. Lane*, 245 U. S. 308, 62 L. ed. 309; *Starr v. Long Jim*; *Munson v. Simonson*; *Franklin v. Lynch* and others as authority. But in this, said court was mistaken in supposing that death removed said restrictions. That case was decided by that court prior to the decision of this court in *Parker v. Richards*, *supra*, in which this court held that death of the allottee did *not* remove such restrictions where a full-blood Indian was left to inherit the allotment of such decedent; but that it simply relaxed such restrictions so as to permit such full-blood heir to sell and convey such allotment as provided in said section 9 of said act. Again, in the case of *Mullin v. United States*, and that line of decisions wherein this court held that such heir

could sell and convey his equitable estate in such allotment prior to the delivery of patents, this court also held, in substance, that, under these prior Acts of Congress and prior to the Act of April 26, 1906, *where the allottee died before receiving his allotment as provided in said prior act*, such allotments when selected and set apart, *were not*, and did not become, *restricted* and their alienation forbidden under such prior act. Hence, as to such allotments such heirs thereby were *sui juris* and there being no restrictions on such inherited property under said acts, they, of course, could sell and convey *their equitable* estate before patents as well as the entire estate after such patents should be delivered. In other words, they were free to sell and convey such inherited property as they saw proper the same as any other individual. That is altogether different from the condition in the case at bar where not only this allotment was restricted, but the title thereto actually held in abeyance until the patents therefor should not only be issued but must likewise be recorded, before the allottee or his heir obtained the title thereto; and section 5 of said Act of May 27, 1908, positively provided that any attempted alienation by deed, etc., of such allotment, made either before or after said act, and made prior to removal of restrictions therefrom, shall be absolutely null and void. Said Circuit Court of Appeals in that part of its decision relied upon said section 22 of said Act of April 26, 1906, as the Congressional authority for

the execution of said deed; but, as we have said, said section was repealed by section 9 of said Act of May 27, 1908; and the sale and conveyance of such lands arising under or governed by said act is governed by the terms and provisions thereof, and particularly sections 2, 4, 5 and 9 thereof, each relating to different characters of alienation, but said section 5 pertains specially to the conveyance, etc., and leasing of such lands and provides emphatically that any violation thereof, either before or after said act, shall be absolutely null and void. Aside from this decision in this case by said Circuit Court of Appeals, we know of no decision of this court or any other court of competent jurisdiction on these matters which has ever held that a restricted Indian could sell and convey the equitable estate in his restricted lands or his inherited restricted lands, where the legal title thereto then remained outstanding and not held by such heir. Statutes should be given a reasonable and sensible construction always; and to hold that a restricted heir could sell and legally convey the equitable estate in his restricted inherited lands but could not sell the legal title thereto under a statute which holds the title thereto in abeyance until the patents therefor were recorded and thereby made effective, and at the same time holding all rights therein in abeyance until such title thereto thereby became effective by such recordation, and before such title thereto actually vested in such heir, would seem directly contrary to such acts

and to the intention of Congress; and it is the intention of Congress in all these statutes that must prevail and is the law of the case. There is no provision in section 5 of said Act of May 27, 1908, providing for or even implying that any fractional or particular estate in such lands may be sold or conveyed, *prior to the removal of restrictions therefrom*. But, it does provide that, "any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, etc., made before or after the approval of this act, *which affects the title of the land allotted to allottees* of the Five Civilized Tribes prior to removal of restrictions therefrom, * * *" shall be absolutely null and void. There could be no useful or sensible purpose in Congress thus by said section 5 of the Act of 1906, holding the vestiture of the title to such lands accruing thereunder in abeyance until such patents were thus recorded, and at the same time intending or providing that the allottee or his restricted heir could sell and dispose of the equitable estate in such allotments prior to the recordation of the patents therefor by which the title thereto could alone be passed or vested in the allottee or his heirs, and at the same time making such lands inalienable, and providing in Sec. 5 of the Act of May 27, 1908, that any such attempted alienation or incumbrance, made before or after that act and prior to removal of restrictions, should be *absolutely null and void*. The equitable estate is the substantial and beneficial estate in lands, the legal

title thereto often being a shadow with but little value. Then, what motive could Congress have had in permitting such restricted Indians to dispose of their substantial equitable estates in such lands and at the same time holding in abeyance simply the legal title, thus letting the substance escape while still clinging on to the shadow? No such a construction as this is tenable; and it is our contention that the provisions of section 22 of said act of 1906 have no application in this case, but were repealed by said Act of 1908, and the substitution therefor made in said Sec. 9 thereof even before the death of Mahaly Watson, the original allottee. In the Choctaw-Chickasaw Agreement there is a provision in which the words "affected" and "incumbered" are used in a similar manner as that provided in section 5 of the Act of 1908. These words have been construed by the Supreme Court of Oklahoma and the reference thereto given and former decision quoted in the case of *Butterfield v. Butler, et al.*, 150 Pac. 1079, as follows:

"It is unnecessary to give the various definitions of the word 'affect.' It is enough to say that it is often used in the sense of acting injuriously upon persons and things, and in this sense we are of the opinion it was used in this proviso. This interpretation accords with the reason and manifest intent of the proviso.

"'Encumber' or 'incumber,' in its legal sense, means a burden on the title or a charge on the property; a claim or lien on an estate, which may diminish its value.

"It is clear, we feel, that the above pro-

vision of the Supplemental Agreement should be construed to mean that allotted lands of members and freedmen of the Chickasaw and Choctaw Nations should in no manner be charged with or burdened by or injuriously affected with any debt, of any character, contracted during the restricted period.

“We think the construction in the opinion above quoted is fair, reasonable, and correct, and that any other would be strained and unreasonable.”

We are further of the opinion that when this Act of April 26, 1906, was enacted by Congress it was thus intended by Congress to make material changes in such prior laws, and this fact seems to have been in the mind of this court in *Mullin v. United States*, *supra*, wherein the act is referred to or, at least, the year 1906, in construing acts prior thereto. This act provided for the enrollment of new-born Indians within the limited time there prescribed; and in section 5 thereof provided expressly for the first time that patents should be in the name of deceased allottees and that the title to such lands should not pass until the recordation of such patents. In the case of *Starr v. Long Jim*, *supra*, an allotment was made to him, but no provision for a patent to him for his allotment. Congress, afterward, made a provision for the Secretary issuing a patent to him for the same and such patent was afterward delivered. In the meantime Long Jim had sold a part of his allotment and had received the whole consideration before receiving such patent. It was then contended

by the purchaser in that case that the Indian had a right to sell this part of his allotment and while he did not then have the legal title thereto, as he had no patent therefor, still when such patent was delivered he thereby acquired the legal title, and under the doctrine of after-acquired property, the legal title, under the doctrine of relation, related back to the deed made before such patent, and thus inured to his benefit. But this court in that case held otherwise, specifically pointing out that Indians were *non sui juris*, the lands were restricted, and the doctrine of after-acquired property had no application to such Indians or such conveyances of their restricted property, etc. There Long Jim had been awarded in severalty a part of the Indian reservation and was in the possession thereof long before executing said deed, but did not have the legal title thereto. His sale was thus held absolutely void under said Acts of Congress and the rules of estoppel and after-acquired property were denied application. In the case at bar, we find practically the same condition as to the allotment here involved, except Mahaly Watson being simply an infant and said allotment being arbitrarily made by the Dawes Commission. She having died long before any patents were either issued therefor or recorded, she can hardly be said under the provisions of said section 5 of this Act of 1906, to have died even in the possession of said lands, or that at that time she had even the equitable estate therein. We are not unaware of the fact that

many decisions may be cited to the effect that under these *prior Acts of Congress* the certificate of allotment vests in the allottee therein mentioned the equitable estate of such allotment. But this Act of April 26, 1906, made *its own* specific provision in these respects; and it was under this act, and this act alone, that Mahaly Watson was enrolled and said allotment made. Hence, the specific provisions of said act and subsequent Acts of Congress must alone be looked to in determining the character of the estate held therein by Mahaly Watson and her mother Hannah Canard Barnett, if, in fact, Mahaly Watson ever had any estate therein whatever; and it is our contention that she had no estate therein, neither legal nor equitable, at any time during her lifetime, for by said section 5 of said act of 1906, it is provided that if such allottee die before the title becomes effective, and it is made effective only by reoordation of the patents as therein provided, the title to such lands *inures to and vests in the heir*. The word "*heir*" here used is not used in its technical sense so as to designate that such lands descend, but is used in the broad sense to indicate the person, or persons, to whom the title to such allotments inure or vests, as provided in said section. As these patents to the allotment involved were not recorded until after the death of Mahaly Watson and after this deed to Sims, we maintain that Mahaly Watson had no estate in said allotment at the time of her death, and her mother acquired no estate therein after her

death until said patents were duly recorded on March 27, 1909; and that her deed to Sims on March 22, 1909, was, under the provisions of said Acts of April 26, 1906, and May 27, 1908, absolutely null and void as expressly so provided by Congress itself in said acts, and particularly in sections 5 and 9 of said Act of 1908.

Deed to Sims Was a Warranty Deed to Said Lands in Fee Simple.

There is still another reason why said deed to Sims was not admissible in evidence on the trial of this case. On page 139 of the record appears this alleged deed to Sims, and leaving off the acknowledgment thereto, we, for the convenience of the court, here copy the same as follows:

“Warranty Deed—(Statutory Form.)

“State of Oklahoma, Hughes, County—ss.

“Know all men by these presents: That Hannah Canard, party of the first part, in consideration of the sum of Five Hundred Dollars in hand paid, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey unto B. O. Sims, the following described real property and premises, situate in Creek County, State of Oklahoma, to-wit:

The North Half of the North Half of Section Twenty-one (21), Township Seventeen (17) North, Range Seven (7) East, together with all the improvements thereon and appurtenances thereunto belonging and warrant the title to the same.

“To have and to hold said described premises unto the said party of the second part his heirs and assigns forever, free, clear and discharged of and from all former grants, charges, judgments, mortgages and other liens and incumbrances of whatsoever nature.

“Signed and delivered this 22nd day of March, 1909.

Hannah Canard.

“Witness: C. L. Smith, W. J. Brown.”

Here, in form, is a plain statutory warranty deed for said allotment. It will hardly be contended that the same is not an effort to convey said allotment in fee simple, thus attempting to convey the legal and equitable title thereto and every other estate incident to said allotment. Granting at present for the sake of argument, that Hannah Canard Barnett at the time of making this deed then held and owned the equitable estate in said allotment, it can hardly be maintained by any one that she then owned the legal title thereto as the patents for said allotment had not then been recorded when she made said deed, and were not recorded until five days thereafter. Hence, she could not possibly convey the title thereto under said deed, and did not do so by the execution thereof. And as after-acquired property and title (*Starr v. Long Jim, supra*), to Indian lands do not apply to their deeds for their restricted lands, as shown by the above decision of this court and others, it follows as conclusive and indisputable that the legal title to said allotment did not

pass to or vest in B. O. Sims under said deed or to any of his subsequent grantees, but still remains vested in Hannah Canard Barnett to this day. Then, *query*: Did said deed convey even the equitable estate of Hannah Canard to said allotment, even if she then had the same? The deed on its face purports to be a warranty deed for the fee simple to said allotment, and not for the equitable estate therein. Evidently, the deed as so executed did not separately convey the separate equitable estate, for such is not the terms or provisions of said deed, and to give it such construction is to do violence to the language, terms and provisions of the deed written in plain and unambiguous language, in which the rule of construction is, that the deed must be given the plain and ordinary meaning of such language, and needs no construction. Besides, it purports to be a legal instrument and therefore must be given such construction as results from the language used, and the object, intent and purposes of the parties thereto, and especially the grantor therein. Hannah Canard Barnett, being a full-blood Creek Indian woman, and therefore *non sui juris*, could not convey said allotment save and except as made and provided in said Act of Congress approved May 27, 1908; for she acquired no interest whatever therein until after said act was in full force and effect, Mahaly Watson having died in October or November, 1908, which was after said act became fully effectual. Hence, a deed for said allotment had to come under the provisions

of section 9 of said act, and unless executed in conformity therewith, the same was utterly void as provided in said act and particularly section 5 thereof. Had it been so attempted on the trial of this case, verbal testimony could not have been introduced by the appellees to change or modify said deed or its nature and character, or that it was then intended to convey by said deed simply the equitable estate in said allotment then claimed to be owned by said Hannah Canard. This would have entirely changed the terms, provisions and character of a written contract, which is not permissible where the contract is full, plain and unambiguous, as is this deed. But this was not attempted for the court permitted the introduction over objections and exceptions of the appellants as shown by the record. The deed does not convey, or even attempt to convey, simply the equitable estate; and it could not convey, or afterward be made to convey, the fee simple title to said lands as is purported on its face. In other words, as Hannah Canard Barnett could not legally execute the deed she undertook to make to Sims, *first*, because the lands were then restricted in her hands to the extent of whatever interest she had therein, and *second*, because she did not then have the legal title thereto, thus sought and attempted to be conveyed by the deed, said deed was simply "*an attempted alienation*" of said allotment in fee simple by said deed, and is therefore absolutely null and void, under section 5 of said Act of May 27, 1908, which was

then in full force and effect when said deed was attempted to be made. But to this it may be contended that under section 1160, of Revised Laws of Oklahoma, 1910, which provides, in effect, that where one by deed or mortgage conveys a greater interest in lands than he actually owns, that what he then owns or may thereafter acquire shall be conveyed under said deed; and therefore, the equitable estate in said allotment passed under said deed at the time of its execution and the after-acquired legal title thereto also vested thereunder when so acquired on the recordation of said patents. But we have shown by the decisions of this court in *Monson v. Simonson*, *Franklin v. Lynch*, and others above cited that this doctrine of after-acquired property does not apply to Indian deeds and was positively rejected and held inapplicable in the *Monson* and *Franklin* decisions which arose out of the matters of these Five Civilized Tribes, and in construing chapter 27, of Mansfield's Digest spread over Indian Territory on February 19, 1903, held that such provisions therein contained did not apply. If so, then would the other provision of section 1160, for the conveyance of what interest they had apply to Indian deeds? If the doctrine of after-acquired title therein embraced does not apply to Indian matters, it follows as conclusive that the other provision would likewise not apply either. Besides, it has been held time and again by the Supreme Court of Oklahoma, that the statutes of Oklahoma do not apply to these restricted lands

of these restricted Indians. Hence, that part of section 1160 did not apply to this deed and the equitable interest of Hannah Canard in said allotment, if in fact she had any at the time, did not pass under said deed. Hence, the deed was absolutely null and void from any consideration. It may be said that said Circuit Court appeals held that the holding of the legal title in abeyance until such patents were recorded was not a restriction on said allotment. But Long Jim was denied the power to sell his equitable interest prior to obtaining a patent, and that his prior sale and deed did not inure to the benefit of his purchaser even after he acquired the legal title. We contend that under section 5 of this act of 1906 the alienation of all allotments affected thereby which includes the present allotment are restricted until the Government and the Creek Nation had been divested of the legal title thereto and it vested in the allottee or his heirs, as in said section provided. But no matter, the alienation of this allotment and any right, title, interest or estate therein is restricted and prohibited by section 9 of this act of May 27, 1908; and any attempted alienation thereof without complying with the provisions of said section is absolutely null and void as decreed by Congress itself in section 5 of said act. As said deed could not convey the legal title to said allotment then or thereafter, and as it does not attempt to convey the equitable title therein, even if she could have conveyed the same, said deed is a nullity. A fair sample of this

and the use of such Indian deeds may be seen in the case of *Libby v. Clark*, 118 U. S. 250, 30 L. ed. 133, which, likewise, involved the legal force and effect of an Indian deed and its admission in evidence on the trial of an action of ejectment brought by Libby against Clark. Justice MILLER delivered this opinion, and in the beginning thereof observed:

“Both parties assert title through William Hurr, who is by birth and descent an Indian of the Ottawa Tribe, and was one of the chiefs and head men of the tribe. On the trial the plaintiff read in evidence a patent from the United States to Hurr for the land in controversy, and offered a deed from said Hurr to J. S. Kallock, which, on objection of the defendant, the court refused to receive, and the exception to this ruling, which was affirmed by the Supreme Court, presents the question of federal law which gives jurisdiction to this court.”

And after considering the federal acts involved therein, held that said Indian deed was void because in violation of said acts, and closed said opinion as follows:

“Two decisions of the Supreme Court of Kansas on the same subject give this construction to the treaty. The opinion of that court in the present case is an able examination of the question, and we concur in the views there stated.

“The judgment of that court is affirmed.”

From these premises we maintain that this deed of Hannah Canard Barnett to Sims for this allot-

ment was absolutely null and void in the beginning, and therefore, was not admissible in evidence on behalf of the appellees for any purpose whatsoever, and the trial court erred in admitting it and the Circuit Court of Appeals, likewise, erred in thus affirming the action of the trial court in overruling the objections of appellants thereto.

Approval of Said Deed, June 17, 1913, by the Judge of the County Court of Okfuskee County.

There were two attempted approvals of this one deed, one by the County Court of Hughes County, Oklahoma, on March 22, 1909, and the other by said county judge on June 17, 1913. It is admitted by the parties hereto and shown by the record that during her life time, and at the time of her death, Mahaly Watson lived, resided and had her place of abode with her mother, Hannah Canard, in Okfuskee County, State of Oklahoma. Hence, this pretended approval by the County Court of Hughes County was absolutely void and the whole proceedings therein were absolutely void and were not susceptible of ratification or *waiver*. *Okla Oil Company v. Bartlett*, 236 Fed. 488, where a similar deed under similar circumstances, was attempted to be approved by said County Court of said Hughes County and there held to be utterly void. This approval seems not to be insisted upon by appellees in this case and hence will receive no further consideration.

It is our contention that this approval of June 17, 1913, by the county judge of the County Court of said Okfuskee County is, likewise, utterly void, for various reasons, among which are, *first*, that said approval, if made at all, was made solely and alone by A. P. Smith, who was the judge of said County Court of said Okfuskee County at that time; and the same was done and all proceedings pertaining thereto were had at his individual home and residence, he being then so sick and afflicted that he was unable to hold court or even to get to the court room and never thereafter held court or visited the court room, but died of such illness in July, 1913; *second*, because said approval was not made by the County Court of said Okfuskee County which alone had jurisdiction of the settlement of the estate of said Mahaly Watson, as made and required in Sec. 9, of said Act of Congress approved May 27, 1908, and such approval was never then or thereafter approved, confirmed, ratified or recognized by said County Court in any manner whatsoever; *third*, because on the 17th of June, 1913, said County Court was not in session at any time on said date, but had adjourned for the term on May 20, 1913, by order of said court, because of said sickness and inability of said county judge to hold the same and was never in session thereafter from said date during the life time of said county judge and not thereafter until in October, 1913, when convened under a newly appointed county judge; *fourth*, that said deed being absolutely null

and void when so executed was legally incapable of being approved either by said county judge or said County Court or otherwise, as there was nothing upon which such an approval could operate under said section; *fifth*, because, even if said deed conveyed the equitable estate in said allotment, it did not convey the legal title thereto, and being a warranty deed for the entire estate in said allotment, said deed was incapable of being so approved, and neither said county judge nor County Court had any legal authority or jurisdiction whatever to approve the same as so attempted or otherwise, *sixth*, because said alleged approval was not at the instance and request, or knowledge and permission of said Hannah Canard Barnett, but was done at the instance and request and for the benefit of R. S. Litchfield, who then claimed to own said lands or a material interest therein under various void deeds therefor; *seventh*, because said deed was not attempted to be approved for the original consideration, but for an additional consideration of \$2,000.00, which was paid by said Litchfield and not said Sims, and constituted a new contract, or, at least, arrangement for the purchase of said allotment without any new deed therefor, and without the knowledge, consent or permission of the said Hannah Canard Barnett; *eighth*, because prior to said approval and at that time Hannah Canard Barnett had instituted her suit against said Sims, Litchfield and others to have said deed cancelled and annulled, and thereby had repudiated said

deed and all rights thereunder, and had employed counsel to bring such suit for such purposes; *ninth*, because said approval was brought about by fraud, deception and misrepresentation made to and practiced upon said Hannah Canard Barnett and likewise upon said county judge and by reason of which said alleged approval was obtained; and *tenth*, because by reason of such fraud, deception and misrepresentation whereby such approval was thus obtained, said approval thereby became a nullity and had no legal force and effect whatever as an approval of said deed, under section 9 of said act, or otherwise.

FIRST GROUND. It is our contention that the approval of a full-blood heir's deed for his restricted inherited lands under section 9, of said act of May 27, 1908, in order to be legal and a compliance therewith, must be made by the court having jurisdiction of the settlement of the estate of such deceased allottee, and cannot be made by the county judge of such court. In this case we are sustained by the following decisions:

Brader v. James, 154 Pac. 560, 62 L. ed. 597;

Simpson v. Staples, 155 Pac. 213;

McCosar v. Chapman, 157 Pac. 1059;

Moffett v. Conley, 163 Pac. 118;

Cushing v. Whaley, 165 Pac. 135;

Bruner v. Nordmeyer, 166 Pac. 126;

Sampson v. Smith, 166 Pac. 422;

Lulu v. Powell, 166 Pac. 1050;

United States v. Western Vest Co. 236 Fed. 726;

United States v. Knight, 206 Fed. 145;

Harris v. Gale, 188 Fed. 712;

MaHarry v. Eatman, 116 Pac. 935;

Mullin v. Short, 133 Pac. 230;

Campbell v. Dick, 157 Pac. 1062;

Boxley v. Scott, 162 Pac. 688;

Buck v. Simpson, 166 Pac. 146;

Tiger v. Western Investment Co., 221 U. S. 285, 55 L. ed. 738;

Parker v. Richard, 250 U. S. 235, 63 L. ed. 954;

Harris v. Bell, 254 U. S. 103, 65 L. ed. 54.

In conflict therewith are *United States v. Black*, 247 Fed. 942, 160 C. C. A. 132; *Barnett v. Kunkle*, 259 Fed. 399-400; this present decision, and the very recent decision of the Supreme Court of Oklahoma of *Snell v. Canard, et al.*, rendered in July, 1923, and not yet reported. In the case of *MaHarry v. Eatman*, and some of the other decisions, it is specifically pointed out that such approvals must be made by the County Court in contradistinction to the judge of such court.

As to this approval, the facts are substantially as follows: About two or three weeks prior to the 17th of June, 1913, the appellants and their counsel, George C. Crump, met at the town of Weleetka, in said Okfuskee County, to consider said suit which he had instituted for them to cancel said deed,

whereupon he informed them that he could perhaps win said suit but it would take a long time and he could not attend to it at that time, but that he would give his client, Hannah Canard Barnett, \$2,000.00 to be released from his contract as her counsel in said suit. She accepted his proposition and as she says that as he could not attend to it, etc., whereupon Crump returned to Holdenville. A man by the name of Wallace and one by the name of McDermott were also present on said occasion and after Crump had left went with the appellants over to Okemah, where Judge Smith lived, and as she supposed, to get this \$2,000.00. When they got there Judge Smith was so sick they were not able to see him and returned home. In about two weeks thereafter McDermott, or Wallace, again took them over before Judge Smith; and on arriving at Okemah found that Judge Smith was still sick and confined to his bed and unable to leave his home. So they went down to his residence and after arriving there Wallace, and perhaps McDermott, went into his home and after a while came out and invited Hannah Canard Barnett in. It seems that McDermott acted as interpreter on said occasion as Hannah Canard Barnett can neither read, write nor speak or understand the English language, only a few words, but can just write her name. Judge Smith got up out of his bed and sat on the side of the bed and asked Hannah if she was expecting \$2,000.00, and was informed that she was, whereupon Wallace handed

Judge Smith a draft, or check, for \$2,000.00 made payable to Hannah and at the same time J. B. Patterson seemed to have been present and exhibited to Judge Smith another check for \$2,000.00 made payable to George C. Crump. Hannah took the check away with her and deposited the same in a bank at Weleetka. This is about all she remembers or seems to know about what took place on that occasion. It is claimed by the appellees that on said occasion a petition was presented to Judge Smith for the approval of said deed, sworn to by appellants and signed by Crump & Skinner and the same is dated May 26, 1913; and that on said occasion the county judge signed this alleged approval of June 17, 1913, and attached the seal of the court thereto and that Patterson took the same back to the office of clerk of said County Court the same evening, and the clerk copied the same into a book kept in his office for such purposes. Wallace states that he was there acting on behalf of R. S. Litchfield and that the \$2,000.00 draft given to Hannah was the money of said Litchfield and Patterson admits that he was likewise there acting on behalf of Litchfield. This is, in substance, about what occurred and the manner in which this alleged approval was obtained so far as appellants seem to know. Mr. Dossy, the clerk of said County Court, testified in the case and states positively that on the 17th of June, 1913, Judge Smith was not at the court house of said county and that the County Court was not in session on said

day and that Judge Smith was never at said court house at any time after the last of May, until he died in July thereafter. In fact, no one claims that Judge Smith, who was the county judge of said county, was at the court house of said county when said approval was made or at any time on said date or thereafter. So the record in this case shows conclusively that this pretended approval was simply signed by Judge Smith at his home and residence on the 17th of June, 1913, and at that time he was so sorely afflicted as not to be able to get to the court house but was confined to his bed and unable to leave home; that he arose from his bed on that occasion and while sitting there on the side of the bed, or somewhere near, he signed this order and handed the check to Hannah. So it is shown that the order was executed by Judge Smith simply signing the same and it was then carried to the clerk's office and by the clerk without any instructions whatever from Judge Smith or such County Court, simply entered on the book. The approval itself then seems to have disappeared as the same could not thereafter be found, and was not produced on the trial of said cause, but what purported to be a certified copy of the entry of said order in said book was offered in evidence on said trial and objected to by appellants for various reasons, among which was that the same was not the original approval, but simply a copy of a copy purporting to be so recorded and without any authority of law whatever. Unless

there is a law permitting or requiring an instrument to be recorded but the instrument is recorded somewhere without such authority, a copy of such instrument is not admissible in evidence. *Burch v. Taylor*, 152 U. S. 632, 38 L. ed. 578.

Section 5099 of the Revised Laws of Oklahoma, permits the use of certain certified copies of original instruments legally placed of record, where the originals are not in the possession or control of the party desiring to use them. But it must first be shown that the parties desiring to use such certified copies do not have the possession or control of the originals, *West v. Cameron*, 39 Kan. 736, 18 Pac. 894; *Clark v. Lloyd*, 20 Kan. 390; *Marshall v. Sherry*, 11 Kan. 114; *Bergeman v. Bullitt, et al.*, 43 Kan. 709; *Sparks v. Oklahoma Construction Company*, 19 Okl. 55, 91 Pac. 839, and *Wigmore on Evidence*, Sec. 1679 and thereafter. But appellees made no attempt on the trial to show or establish that they themselves did not have this original approval in their possession or under their control, but simply sought to show by M. C. Jones and Mr. Dossy that they, said clerks, were not able to find the same after a search therefor. This does not comply with the requirements of said Sec. 5099, even if said section applies in a case of this kind. But it does not so apply, for at that time there was no law of the State of Oklahoma requiring said approvals to be recorded; nor is there any such provision in said Act of Congress or otherwise of which we have any

knowledge, and no authority for thus using in evidence on that trial simply a copy of a copy has ever been shown and we believe none can be shown. Hence, this copy of a copy of that entry was not competent evidence and the trial court erred in permitting the same to be introduced in evidence over the objections and exceptions of appellants. *Burch v. Taylor*, 152 U. S. 632, 38 L. ed. 578.

But waiving for the moment the inadmissibility of this alleged copy, we still insist that said approval was inherently illegal and did not operate as an approval of said deed and that said deed has never been approved as required in said Section 9 of said Act, for the reasons hereinbefore set forth. This case shows that all the approving of the deed that was done was simply by A. P. Smith, who was the judge of said County Court; and we contend that without a compliance with this federal act. In *Parker v. Richard* and *Harris v. Bell*, *supra*, this court indirectly holds, that such deeds must be approved by the court having jurisdiction of such estates; and in the *Parker* case referred to the fact that the federal agency for such approvals being a state court made no difference, and in the *Harris* case it was distinctly pointed out that the County Court of Wagoner County wherein the deceased allottee in that case died was the proper court for such approval of a deed involved therein. In this case of *United States v. Black*, 247 Fed. 942, the deed was approved by the county judge of Hughes County at

Atwood, a non-court town of said county; and the Circuit Court of Appeals held that when the approval was placed of record by the County Court it operated as a valid approval for the reason that under the probate laws of Oklahoma the court was always in session and the judge thereof could attend to such probate business without such court being in session on other matters, etc., or this in substance. That decision was followed by the same court in the two prior decisions of this case. But there is no evidence in this case that the County Court of Okfuskee County ever directed or authorized this approval to be recorded; and no evidence that Judge Smith so ordered it. But Mr. Dossy, the clerk, says the same was brought in his office and simply entered of record of his own accord. This differs in condition from *United States v. Black*, even on that theory. In the first place the Circuit Court of Appeals was mistaken in supposing that approval of an Indian deed was a probate matter coming within the authority of county judges to approve in vacation. The probate jurisdiction of the County Courts of Oklahoma is fixed by the State Constitution wherein they are enumerated. But, of course, the approval of an Indian deed is not within that scope or provision. Besides, the Supreme Court of Oklahoma in the recent case of *Molone v. Wamsley*, 195 Pac., at page 485, holds:

“The County Courts of this state, in approving conveyances by full-blood Indian heirs,

do not exercise any probate jurisdiction conferred upon them by the Constitution and the laws of the State of Oklahoma, but merely act as federal agents, and in approving the conveyances of Indian heirs perform only a ministerial act."

Of course, the construction of a state statute or constitution by the court of last resort of that state is binding on all other courts; and as the Supreme Court of Oklahoma has thus in this *Molone* case construed the probate jurisdiction of the County Courts of said state in connection with these Indian approvals and thus holds that "the County Courts of this state, in approving conveyances by full-blood Indian heirs, do not exercise any probate jurisdiction conferred upon them by the Constitution and the laws of the State of Oklahoma, but merely act as federal agents," it would seem that the approval of such deeds do not and cannot be a probate matter under said state laws, as was held they were in *United States v. Black*, *supra*, and followed in the prior decisions in this case. Therefore, if the judge of the County Court can alone approve these deeds of these full-blood heirs his authority so to do must come under and arise from this federal act, as it cannot arise under any state law as so held in this *Molone* case. There is no such provision in Section 9 of this Act of Congress. Section 8 of that Act confers upon such county judges authority to approve Indian wills for it says, "or a judge of a County Court of the State of Oklahoma,"

thus empowering any judge of any such County Court, regardless of where the Indian might live or reside. But in the very next section Congress was careful to provide that such approvals should be made by "*the court having jurisdiction of the settlement of the estate of said deceased allottee.*" Thus, it is shown in these two sections, the one empowering the county judge of a County Court of Oklahoma to approve a will, and the other expressly providing that such conveyances of full-blood heirs must be approved "by the court having jurisdiction of the settlement of the estate of said deceased allottee," Congress used these terms advisedly and made its own distinction in said sections as to the federal agency thus empowered to approve such wills and such deeds. We will not pause here to elaborate on the meaning and significance of the word, "*court,*" thus used in said Section 9, or what the term legally signifies as that will be fully presented in the supplemental brief.

We will, therefore, close this discussion of the admissibility of this deed and said alleged approval thereof with an excerpt from the opinion of this court in the case of *Starr v. Long Jim, supra*, as follows:

"As to the effect of the after-acquired title, while the general rule is that a conveyance with warranty estops the grantor, when he afterwards becomes the owner of the lands assumed to be granted, to deny the grantee's title (Bigelow, Estoppel, 2nd ed., p. 324, etc.), it is well

settled that the doctrine does not apply to a case of conveyance made by one *non sui juris*, or what is contrary to public policy or statutory prohibition. *Bank of America v. Banks*, 101 U. S. 240, 247, 25 L. ed. 850, 853; *Doe, ex dem. Chandler v. Ford*, 3 Ad. & El. 649, 5 Nev. & M. 209, 1 H. & W. 378, 5 L. J. K. B. (N. S.) 25; *Den, ex dem. Wooden v. Shotwell*, 24 N. J. L. 789; *Connor v. McMurry*, 2 Allen 202, 204; *Doyle v. Coburn*, 6 Allen 71, 72; *Merriam v. Boston C. & F. R. Co.*, 117 Mass. 241, 244; *Brick v. Campbell*, 122 N. Y. 337, 346, 10 L. R. A. 259, 25 N. E. 493; *Kennedy v. McCartney*, 4 Port. (Ala.) 141, 158.

“Since it is entirely plain, in the case before us, that the title to the lands in question was retained by the United States for reasons of public policy, and in order to protect the Indian against his own improvidence, it follows as a matter of course that a conveyance made by one of them, before the title was vested in him pursuant to the Act of 1905, was in the very teeth of the policy of the law, and could not operate as a conveyance, *either by its primary force or by way of estoppel.*” (Italics are ours.)

Hence, it must follow that in as much as Congress retained the title to these Indian lands under this Act of April 26, 1906, until the patents therefor were executed, recorded and delivered as provided in Section 5 thereof, it was against public policy and the intent and purpose of Congress to so protect these Indians thereby, for an Indian to attempt to convey said lands and especially by warranty deed, at any time prior to the recordation of such patents

and while the title thereto was still retained by the government, as so held in this *Starr* case. It, therefore, further follows that this pretended deed of Hannah Canard made to Sims on March 22, 1909, before such title had vested in her or been transferred from the Government, was void and executed in violation of and in the very teeth of said Act; and therefore, being void or as provided in Section 5 of the Act of 1908, being "*absolutely null and void*," the same could not be legally approved, even in regular form, and said alleged approval was absolutely void also, not only for that reason but for the further reason that such approval was made simply by said county judge, and not the County Court of said Okfuskee County. Hence, the trial court erred in admitting said deed and approval in evidence in this case; and said Circuit Court of Appeals erred likewise in its decision.

We have gone to considerable length under this first assignment and these two propositions for the simple fact that if said deed and approval, or either of them, are void under said Acts of Congress, that ends this whole controversy in favor of appellants and against these appellees regardless of anything else involved in this case.

SECOND GROUND. This relates to the necessity of said deed being approved by the County Court of Okfuskee County and not the county judge thereof; but as this has been presented under the first

ground and more fully discussed in our supplemental brief, it will not be further considered here.

THIRD GROUND. This is to the effect that the County Court of Okfuskee County was not in session on the 17th of June, 1913, or at any time after May 20, 1913, during the life of said county judge, who died in July thereafter. As the approval of a full-blood heir's deed to his inherited land is not a probate matter under the Constitution and laws of Oklahoma, it follows that if the same must be approved by such County Court in contradistinction to said judge thereof, as held in *MaHarry v. Eatman*, *supra*, and some other of said decisions, and as we maintain is correct, then, of course, such approvals could not be made when such County Courts were not, and legally could not be, in session under said laws and constitution of said state, and this alleged approval is a nullity. But as this feature is fully discussed and the statutes and decisions of said state are given hereafter and in the supplemental brief herewith, we will not discuss that matter further at this time.

FOURTH GROUND. This is to the effect that said deed was absolutely null and void when executed and, therefore, could not be approved. If so, then, of course, the approval would be a nullity as there would be no field upon which such approval would operate. *Jackson v. Brown*, 15 Johns. 264, wherein it was held:

“If the deed to Gillett was void for maintenance, in consequence of adverse possession, it would seem to me that the approbation of the surveyor general would follow the fate of the principal or subject-matter, and that it would be a void execution of the power intrusted to him. His assent being given to a deed that could have no effect or operation in law, and was not an execution of the power vested in him, and could not preclude his approving of a valid deed. Indeed, the Act of 1810, which confers the authority on the surveyor general of approbating deeds given by Indian patentees, or their heirs, restricts the approbation to *legal deeds*; the deed, then, if given *not being legal*, the approbation on that ground was *void*, and *being void*, it is a *nullity*.” (Italics are ours.)

And in *Laughton v. Nadeau*, 75 Fed. 787, where it was held:

“Parties dealing with Indians must take notice of public treaties and Acts of Congress, and do not take land as bona fide purchasers relieved of restrictions on alienations merely because no restrictions appeared on the patent. Proceedings void for want of jurisdiction cannot be cured by ratification or waiver.”

To the same effect is *Okla Oil Co. v. Bartlett*, 236 Fed. 488, where it was held that the proceedings in that case, similar to the case at bar, were a nullity and not susceptible of ratification or *waiver*.

It, therefore, follows that said deed being thus executed before the title passed and while same was held by the government, in violation of Section 5 of the Act of 1906, was void and was not susceptible of

ratification by Hannah Canard; neither could she *waive* its invalidity even if she had voluntarily appeared before the County Court of Okfuskee County itself and attempted to have said deed approved; and the deed being void, could not thus be approved by such County Court, and especially by the judge thereof under Section 9 of said Act of 1908. Hence, that whole proceeding was a nullity, because of such illegalities. When a person *sui juris* makes a deed for a greater interest in lands than he has at time of conveyance, then what interest he has passes by reason of such provisions of said Section 1160 of Revised Laws of Oklahoma, for he is estopped by his deed as to after-acquired property. But it is not so as to persons *non sui juris* like a full-blood Indian as to his inherited lands. *Starr v. Long Jim, supra*.

FIFTH GROUND. This is to the effect that even if Hannah Canard held the equitable estate in said allotment when executing said deed, and said deed was a warranty of the fee simple title thereto, it was void as attempting to convey a title she did not then possess, and such deed being void could not be approved and both were absolutely null and void under Section 5 of said Act of 1908. But this being heretofore and in the supplemental brief fully discussed it will be given no further consideration here.

SIXTH GROUND. This is to the effect that said alleged approval on June 17, 1913, was not at the

instance and request, or knowledge and permission, of Hannah Canard Barnett, but was done at the instance and request and for the benefit of R. S. Litchfield claiming an interest in said allotment under various void deeds. It is our contention that under Section 9 of said Act of 1908, the deed itself, or instrument, whatever it may be, is the object of approval and must be presented at the instance and request of the Indian grantor and with his knowledge and consent as it is on behalf of such Indian grantor alone that such County Courts are acting in such approvals and for whom alone Congress intended such County Courts to act as ~~its~~ federal agency and for none other. Hence, the action of such County Court on behalf of any one other than the Indian grantor would be, as pointed out by the court in *Jackson v. Brown*, 15 Johns. 264, *supra*, beyond its power or jurisdiction to act at all; and, therefore, such action on behalf of others would be a complete nullity and not operate as a legal approval of such deed under said section. It is true, that the record discloses that Hannah Canard Barnett was personally present in the home of A. P. Smith at the time of this alleged approval. But she denies, under oath, that she had any knowledge at any time that said deed was thereby to be approved or her said suit to be compromised or settled. No one but Patterson attempts to testify against her and he only as to what occurred on such approval and then to an exceedingly limited degree as he admits he could not understand Creek except

a little and that she simply answered "Uh huh," (page 122 of the record) to questions asked her on said occasion. The record clearly shows that she could not read, write, speak or understand English language, except a few words and except she could simply write her name. The physical fact is therefore shown that she could not know or recognize one paper from another, or whether there was only one paper or were several papers involved, and could not understand a word there spoken, or what was going on. All that seems to have been said to her by Judge Smith was that he asked her if she was expecting money, and when answered in the affirmative he gave her this draft for \$2,000.00 which Wallace then and there handed Smith, and she then went away. The evident object and purpose of that whole scheme in order to procure that approval was to so manipulate things as to get her in the presence of Judge Smith and then to exhibit to him these two checks, one to Hannah for \$2,000.00 and the other to her counsel, George C. Crump, for \$2,000.00, making it appear that they were settling the case on an equal division of the amount paid therefor, and at the same time to do so without Hannah Canard Barnett actually knowing what was going on, but led to believe by said actions of her counsel that said \$2,000.00 was coming from him to be relieved from his contract of employment as thus disclosed by her in her testimony. She was taken before Judge Smith on said occasion by Wallace or McDermott;

and Wallace was there acting for Litchfield in said premises, as he admits in his testimony, and Patterson was there as counsel for Litchfield. So that, it is clearly proven that what was done that day was for the use and benefit of Litchfield and the money paid to Hannah was that of Litchfield as shown by the testimony of Wallace. Evidently, Judge Smith was likewise deceived into believing this was a settlement of the case and fully understood and participated in by Hannah and was thereby defrauded into making said approval, as such an arrangement and happening of events were easily calculated to deceive and defraud both Judge Smith and Hannah. Besides, he was so afflicted with illness that he could not leave his home and was in his bed and confined thereto when they got there on said date, and it is not at all even probable that he had sufficient mental capacity to comprehend what was going on and was thereby easily deceived and defrauded. On the other hand, she was much easier deceived and imposed upon as she could not understand anything whatever that was said or done. True, they say McDermott interpreted; but he was not called as a witness and the record fails to disclose what he then said to her or what explanation, if any, he made. She testifies that she did not know or understand that this was a settlement or compromise of her suit, and that nothing was ever said to her about having that deed approved and that she did not know that Crump had ever gotten any money at all. It is true that a

petition for such approval seems to have been present, signed by Crump & Skinner and sworn to by her. But on the back of this petition are the following words and figures: "I have examined the facts herein and ask that deed be approved. G. C. Crump, May 26, 1913," which is the same date of the petition, as shown on page 154 of the record. This is the same date on which Crump made his contract of sale and quit claim deed to said Litchfield, as shown on pages 18, 19, and 20 of the record, and was evidently the same day he had this conversation and agreement with Hannah to pay her \$2,000.00 to be relieved from said contract, as she says that she, Wallace and McDermott then went over to see Judge Smith at Okemah, but he was so sick they did not get to see him and then went back in about two weeks, at which time she got that money. It is evident that this petition for such approval was fixed up on May 26, 1913, by Crump, or at least with his knowledge, as he signs the same and makes said note to the judge on the back thereof, on said date, without her knowing the object or purpose of said approval, even though she did swear to it as these Indians swear to anything that is put up to them by their counsel and often by anyone else, without knowing the contents thereof. She evidently did not know the character of said petition as she testifies in effect that nothing was said to her about having the deed approved or the settlement or compromise of her suit. She was then left by Crump in the hands of the opposition

and taken over before Smith by them in the manner disclosed and was there surrounded by those acting for and on behalf of Litchfield to whom Crump had previously assigned his interests in the suit and made him this quit claim deed on May 26, 1913, as shown by the record. From these circumstances, it would seem too evident for dispute that said alleged approval and all things else leading up to it, were done without the knowledge or consent actually given by Hannah Canard, and on behalf of Litchfield with the true object therefor being thus concealed and beclouded. If so, the same was a fraud upon said county judge, upon Hannah Canard Barnett and against said statute and the policy thereof, and is an absolute nullity. *Barnett v. Kunkle*, 259 Fed. 399 and 400. This matter also is more fully discussed in the supplemental brief to which reference is made.

SEVENTH GROUND. This is to the effect that said approval was not an approval of said deed on the original consideration, but for an additional consideration of \$2,000.00 paid by Litchfield and not by Sims, the grantee in said deed, and constituted a new arrangement for the purchase of said allotment without a new deed therefor, and without the knowledge, consent or permission of Hannah Canard Barnett.

In *Midland Oil Co. v. Turner*, 179 Fed. 77, it was held, in effect, that on such approvals the fed-

eral agency could neither add to nor take anything from the instrument to be approved; that it could only approve, or disapprove, the instrument as it was. But here the deed is materially changed, not only in raising the consideration from \$500.00 to \$2,500.00, but the increased consideration is paid by Litchfield, who had no interest whatever in said deed or allotment when it was made. This alleged approval evidently discloses that Judge Smith would not approve the original deed as it existed when made and would not consider such approval until an additional consideration of \$2,000.00 was paid. This, evidently, made a new and different arrangement from the original, even if Hannah had known and understood it and assented thereto. Under said Section 9 of the Act of 1908, it is expressly provided that no conveyance shall be valid until approved by the court having jurisdiction of the settlement of the estate of said deceased allottee. Hence, this deed of Hannah to Sims was not valid until so approved; and the same never has to this day been approved in its original condition as it existed when so made; and evidently Judge Smith refused to approve the same in its original condition, and made said approval only on condition of a new consideration and consequently a new arrangement. This left the deed absolutely null and void in its original condition; and being thus void, it could not be approved by said judge or court or be ratified or its invalidity *waived* by Hannah Canard Barnett who was *non*

sui juris in such matters and said allotment restricted under said Acts of Congress. This would render said approval also null and void as no valid instrument then existed upon which such approval could operate. This is surely true and correct where Hannah Canard Barnett had no knowledge of these matters and never assented thereto as she so testified.

In *Canfield, et al., v. Jack, et al.*, 188 Pac. 1040, points 3, 4, 5 and 6 are as follows:

“3. Congress has exclusive power to authorize, regulate and control the alienation of lands allotted to or inherited by members of the Five Civilized Tribes of Indians, and the law on champerty as set forth in Section 2260 of the Revised Laws of Oklahoma, 1910, had no application thereto.

“4. In the instant case the lands involved were restricted, and the deed of the full-blood heirs required the approval of the County Court in order to be valid, as provided in Section 9 of an Act of Congress approved May 27, 1908 (35 Stat. 312, c. 199).

“5. The doctrine of relation is that principle by which an act done at one time is considered by a fiction of law to have been done at some other time.

“6. In the instant case, Cacy takes a deed from two full-blood Indian heirs, places it of record, and continues in position for more than a year before securing the approval of his deed by the County Court. In the meantime, however, Cornelius takes a deed from the same parties to the same land and had the same approved

by the County Court. The record does not show that Cacy had ever intended to have his deed approved prior to the execution and approval of the Cornelius deed. He contended that as a matter of law his deed did not require the approval of the County Court. *Held*, that the doctrine of relation is not applicable to the facts of this case, wherein Cacy contends that the approval of his deed dates back to its execution and first delivery, thus cutting off the intervening interest of Cornelius to the lands involved."

There Cacy took his deed from full-blood heirs to restricted lands and placed the same of record and thereafter remained in possession of the lands for more than a year before attempting to have his deed approved by the proper County Court, contending that said lands were not restricted and that when he took it, his deed did not have to be approved by the County Court, showing that he did not intend to have it approved, but took it in violation of said Act. In the meantime, Cornelius obtained a deed from the same heirs for the same land and had the same approved under the Act and before any attempted approval of the Cacy deed. This deed to Cacy was held in that case to be void and taken in violation of said Act. Therefore, the approvals thereof did not relate back to the date of the deed under the doctrine of relation. In fact, the doctrine of relation had no application whatever in that case as Cacy's deed was taken in violation of the Act and was therefore illegal, and the doctrine of relation

never applies to an illegal transaction, and would not have applied in that case even if Cornelius had not have obtained his deed and had it approved. But having obtained his deed in the meantime, Cornelius was an intervener between the date of the Cacy deed and its alleged approval. Hence, he was protected thereby against Cacy. *Pickering v. Lomax*, 145 U. S. 310, 36 L. ed., at page 718; and by the approval thereof said County Court exhausted its power and jurisdiction to approve a deed of such heirs for such lands. *Lomax v. Pickering*, 173 U. S. 24, 43 L. ed., at page 603, where this court said:

“By his approval of the first deed the title of Robinson was wholly divested, and there was nothing left upon which a subsequent approval could operate, unless we are to assume that such subsequent approval in some way re-vested the title in Robinson and passed it to McClure.”

And a subsequent approval of a deed of such heirs for the same land whether such deed be made before or after such first approval, the same would be utterly void for lack of power in the federal agency to make the same. *Godfrey v. Beardsley*, 2 McLean 412, Fed. Cas. No. 5497.

For the same reason, as to this deed of Hannah Canard to Sims on March 22, 1909—before she had obtained the title thereto and while it was held by the government and thus attempting to convey the fee simple title thereto with a general warranty—the

doctrine of relation could never apply to said deed under said approval of June 17, 1913, or any other approval thereof, *first*, because the deed itself was illegal and in violation of Section 5 of the Act of April 26, 1906, under which said allotment arose and by which it was governed and also in violation of Section 5 of said Act of May 27, 1908; *second*, because on June 17, 1913, she had acquired the title to said lands by the recordation of the patents therefor subsequent to the date of said deed, and to extend the doctrine of relation back to the date of said deed, to-wit, March 22, 1909, would make said deed include and convey the title to said lands, or at least the legal title thereto acquired after the date of said deed, which is not permissible in Indian deeds under the decisions of this court in *Starr v. Long Jim*, and others heretofore cited; and, *third*, the same would violate Section 4 of the Act of May 27, 1908, wherein, among other things, it is expressly provided:

“That allotted lands shall not be subjected or held liable, to any form of personal claim or demand, against the allottee arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law.”

Here the approval included the previous consideration of \$500.00, claimed to have been paid on March 22, 1909, under said deed then invalid because not legally approved and never thereafter in fact approved for said consideration, but approved only

for an additional consideration of \$2,000.00, thus clearly making said allotment subject and liable to the payment of the original \$500.00 and likewise Hannah Canard Barnett thus held liable therefor and made to account therefor, as on said approval she received only \$2,000.00, which was not the real consideration on which said deed was attempted to be approved on June 17, 1913, thus openly violating said Section 4.

And said approval is also in violation of Section 5 of said Act which provides that an attempted alienation by deed, etc., of such restricted lands before the restrictions thereon are removed therefrom shall be absolutely null and void, thus attempting to approve a void deed which, in turn, not only renders such approval void but makes the doctrine of relation inapplicable thereto as the same was illegal, etc., as heretofore stated.

EIGHTH GROUND. This has reference to the suit brought by Hannah to have said deed cancelled and the same was pending for such purposes at the time of such approval. The prior attempt to approve said deed by the County Court of Hughes County was unquestionably a nullity, as so held in *Okla Oil Company v. Bartlett*, 236 Fed. 488. This unquestionably left said deed invalid, not only for the reasons and on the principles we have given, but because Section 9 of this Act of May 27, 1908, emphatically provides, "That no conveyance of any

interest of any full-blood Indian heir in such lands shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee." (Italics are ours.)

At the time said suit was brought on March 31, 1913, there can be no question about the title to said land, both legal and equitable, being then fully vested in Hannah Canard Barnett; and this is true even under said Section 9, to say nothing of any other illegality arising in said transaction, for until such deeds are legally approved by such proper courts, it is there expressly provided in that section that no such conveyances shall be valid. Such deeds until so approved are in fact no conveyances whatever, for by said section they are thereby prohibited from operating as a conveyance at all until so approved. Hence, such unapproved deeds can vest no rights or interests in the grantees or anyone else, but within themselves and of themselves are simply ineffectual. At best, they could operate only as the written evidence of a transaction with such full-blood heirs for the purchase of their interest in such restricted inherited lands, but which could not be specifically enforced in a court of equity, as such grantors are *non sui juris* and can convey such restricted interests only in the way and manner provided by Congress, and that way is expressly provided in said Section 9, and can be conveyed by such heirs in no other manner. *Stephens*

v. *Smith*, 77 U. S. 321-327, 19 L. ed. 933, in which this court said:

“It is, however, not necessary, for the purposes of this suit, to decide this point, as the deed in question was made after the passage of the Act of Congress of the 26th day of May, 1860, which relieves the subject of all difficulty. See 12 Stat. at L., 21. This Act vested the title of the United States to the lands which the treaty had set apart for the use of the half-breeds, in the reservees, if living, or, if dead, in their heirs, and declared void all prior contracts for their sale, and forbade any future disposition of them, except by the Secretary of the Interior, on the request of the party interested. There is no ambiguity in the Act, nor is it requisite to extend the words of it beyond their plain meaning in order to arrive at the intention of the legislature. It was considered by Congress to be necessary, in case the reservees should be desirous of relinquishing the occupation of their lands, that some method of disposing of them should be adopted which would be a safeguard against their own improvidence; and the power of Congress to impose a restriction on the right of alienation, in order to accomplish this object, cannot be questioned. Without this power, it is easy to see, there would be no way of preventing the Indians from being wronged in contracts for the sale of their lands, and the history of our country affords abundant proof that it is at all times difficult, by the most careful legislation, to protect their interests against the superior capacity and adroitness of their more civilized neighbors. It was, manifestly, the purpose of Congress, in

conferring the authority to sell (on the Secretary of the Interior), to save the lands of the reservees from the cupidity of the white race; and if the provisions of the treaty were not enough for the purpose, the speedy action of Congress was demanded by the rapid settlement of the adjacent country. In 1825, when the treaty was made, it was not regarded as a probable event that these Indians, owing to the remoteness of the country to which they were removed, would suffer from the encroachments of our people, but in 1860 the same population that demanded their removal from organized communities, followed them to Kansas. In this condition of things, Congress acted, and the necessity for legislation on the subject, if, indeed, there were need for any, is shown by the defense which is interposed to this suit.

“It needs no argument or authority to show that the statute, having provided a way in which these half-breed lands could be sold, by necessary implication prohibited their sale in any other way. The sale in question not only contravened the policy and spirit of the statute, but violated its positive provisions. (Italics are ours.)

“It appearing, then, from the treaty and law in force at the date of the deed, Victoria Smith had no capacity to alienate her land, and the authority to sell being vested in the Secretary of the Interior, and there being no evidence that this officer ever authorized the sale, or in any manner consented to it, it follows that the sale was void, and that the deed conveys no title to the purchaser.

“It is hardly necessary to say that a joint

resolution (12 Stat., at L. 628), passed nearly two years after this transaction, removing the restrictions on alienation, cannot relate back and give validity to a conveyance which, when executed, was void; nor have we any reason to suppose that Congress contemplated that any such effect would be claimed for its legislation on the subject.

“We see no error in the judgment of the Supreme Court of Kansas, and it is, accordingly, affirmed.”

Here was an Indian deed executed by a restricted Indian at a time when she had no legal capacity, under that Act of Congress, to execute the same, and without the permission of the Secretary or the request of the Indian grantor as provided in said Act; and here it is held, in effect, that where Congress prescribes a way and manner in which restricted lands of Indians may be alienated, that by necessary implication prohibits any other method. It also holds that where an Indian deed is void because made in violation of an Act of Congress that a subsequent Act of Congress removing such restrictions will not relate back and give validity to such conveyance which, when executed, was void. If a *subsequent Act of Congress* will not validate a previous void deed, it is too evident for discussion that a *subsequent attempt* of the Indian himself to ratify a previous void deed is wholly ineffectual and that such a deed cannot be so ratified by such Indian grantor. It here also appears that such alien-

ation must be at the instance and request of the Indian grantor. Therefore, the perfection of such deeds could not be at the instance and request of the grantee therein or some individual claiming under him through such void deed. But such must necessarily be the case arising out of the very nature of the transaction; for Congress has provided in said Section 9 of this Act of 1908, how the interests of full-blood heirs in their inherited lands may be sold and the same requires a "*conveyance*"; and that necessarily implies that no other method can be resorted to or is permissible under said Section or Act. We will stop here to designate what may come under the definition of the word "*conveyance*," for, certainly, a deed would be so included and, perhaps, other instruments. But, as this deed to Sims is all that is involved here, any further discussion on that feature is unnecessary. It is evident from said Section 9 that Congress intended thereby simply a voluntary conveyance by the Indian heir; and expressly provided then that even his conveyance should not be valid until receiving the approval of such court there designated. So, that, under said section such full-blood Indian heir's deed for his inherited property must first assume the form of a conveyance, which must necessarily be in writing and voluntarily subscribed by the heir, and, then, must be approved by such court, before it conveys any interest whatever to the grantee or becomes a valid instrument for any purpose. No court is by

said Act of Congress given any power or authority whatever to decree the sale of an adult full-blood heir or decree the specific performance of a contract of such heir for the sale of his inherited restricted lands. Hence, as Congress has plenary powers over such restricted Indian lands and they cannot be alienated except as first provided by Congress, and then only by the persons, or agencies, designated in such acts, and leaves it optional with such full-blood Indian heirs whether to sell their inherited lands or not, it follows that the full-blood Indian heirs themselves, and they alone, must act in the premises in the alienation of their restricted lands, and, of course, to the full extent of such action as will result in the legal consummation of the alienation. Hence, if such full-blood Indian heir should make a contract, written or verbal, and in whatever form, for the sale of his restricted lands and then refuse to carry it out even as provided in this Act, there is no power to compel him to fulfill his undertaking. The courts are helpless to compel him to act, but may act on his behalf in relieving him of his improvident and illegal transactions. *Bowling v. United States*, 223 U. S. 528, 58 L. ed. 1080, is an illustration of where this court undertook to decree the specific performance of a contract with restricted Indian heirs for restricted inherited property, which was at their own instance and request and granted by the court below. But this court set aside the same and returned the land to such Indian heirs,

and set aside the judgment of the court below. For the greater reason would a court of equity refuse to enforce the specific contract of such Indian heirs for their restricted inherited lands, against such Indian heirs. In fact, it would have no jurisdiction to decree such specific performance, as such alienation is governed solely by the Acts of Congress and must be performed as such acts provide.

Therefore, when Hannah Canard brought her suit to set aside said deed to Sims on March 31, 1913, she then had an absolute title to said lands and the absolute right to recover the same. She alleged in her cross-petition, in effect, that she did not intend to sell the allotment of her deceased child, but agreed to sell her interest in the allotment of her deceased father, Hully Canard, and did not know that said deed conveyed the allotment of her deceased child until shortly before bringing said suit; and this was one of the grounds on which she sought the cancellation of said deed. It is likely that the Circuit Court of Appeals in its last decision, from which this appeal is taken, was referring to and held that this charge was not proven; and that this was the fraud alleged in the case and referred to in said decision, and held the burden of proof was on her; and as it had failed, this decided the merits of the case. It is true that the testimony of Hannah Canard Barnett did not establish this fact, at this feature of the case was entirely overlooked and she was not asked anything about it.

But this was not all the fraud set up or charged in her cross-petition by any means and was not even the important part of such charges of such fraud, as may be seen from the cross-complaint itself. But that feature will be more fully discussed hereafter. Nor is it correct to hold that even all the fraud charged in said cross-complaint is the only ground of relief in this case or to which appellants are entitled. If said deed was void for any cause set forth in said cross-complaint, it should have been cancelled, whether on the grounds of *fraud* or *inherent invalidity*; and it was not correct to hold that it rested on fraud alone and especially on the fraud of substituting this land for others which was only one of the grounds of fraud specified in said cross-complaint, and that too, the most insignificant of such charges.

As it is not in the power of the court of equity to decree away from an adult Indian his restricted lands, it must follow that it is likewise not in the power of a County Court or any other court having jurisdiction of the settlement of such estates under said Section 9 to so act in the approval of such deeds of such full-blood Indians as to deprive the Indian heir of his restricted inherited lands against his will and consent; and most certainly without his knowledge and consent to such approvals brought about at the instance and request and for the benefit of the grantee in such deed or anyone claiming thereunder through him or his subsequent grantees. In

other words, such approvals provided for in said Section 9 must necessarily be at the instance and request and knowledge and consent of such Indian heir who executes such deed, and not at the instant and request of his grantee therein or anyone else claiming through him; for in passing said act and making these special provisions in said section as pointed out and held by this court in *Stephens v. Smith, supra*, and many others of its decisions in these Indian matters universally recognized, it was the intent and purpose of Congress to provide against the improvident acts of said Indians and to safeguard them and their restricted lands against designing persons, and such provisions were made *alone for the benefit and protection of the Indian heir and not those thus dealing with him in the procurement of his inherited property*. Hence, again we say, that if such County Courts in the approval of such deeds act at the instance and request of such grantees or others claiming an interest in said land and particularly without the knowledge and consent of such Indian grantor, it is acting without legal authority and its alleged approval is a nullity, as such courts are by said section 9 given no jurisdiction whatever to make such approvals except for the benefit and protection of the Indian heir and which must necessarily be done with his knowledge and consent voluntarily given.

**Indian Deeds or Their Approval Obtained by Fraud,
Deceit or Misrepresentation Are Absolutely
Null and Void.**

And we most strenuously maintain that if such consent to the execution of such deed or the making of such approval is obtained from the Indian heirs by fraud, deceit or misrepresentation, such deed or its approval so obtained is a complete nullity. *Barnett v. Kunkel*, 259 Fed. 399, 400. That was so held in this very case by the Circuit Court of Appeals on the first appeal thereto as shown in said report. Hence, if Hannah Canard had no knowledge of such approval on June 17, 1913, or was defrauded by the circumstances surrounding the same as disclosed by the record herein, said approval was a nullity and failed to operate as an approval of said deed; and the same would be true if Judge Smith was thus defrauded thereby. Such a proceeding would otherwise operate to deprive Hannah Canard Barnett not only of her rights to said lands but also of her said right of action to recover the same, without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States; and a portion of that law at least is Section 9 of said Act of Congress of May 27, 1908, passed by Congress expressly for her protection in the possession and enjoyment of said land.

It therefore follows that said approval of Judge Smith did not destroy either her right of action to

recover said land or her rights and interests in said lands themselves.

NINTH AND TENTH GROUNDS. This ninth ground pertains to the fraud, deception and misrepresentation practiced upon Hannah Canard Barnett and County Judge Smith in said approval of June 17, 1913; and the tenth to the legal consequences thereof, under said section 9 of said Act of Congress or otherwise. But these matters have been referred to and discussed in connection with said other grounds; and as the same are fully presented in the supplemental brief, we will not discuss them any further at this time.

We have devoted considerable time and space to this first assignment and to the inadmissibility in evidence of said deed and approval, for, if for any of these reasons, or in our objections on the trial of this case, our position is correct and either of said instruments were so inadmissible, then that ends this whole case and justifies a reversal of these decisions and the entry of a decree of this court in favor of the appellants against said appellees.

S E C O N D A S S I G N M E N T .

In holding and deciding that said deed could be legally executed by Hannah Canard Barnett on March 22, 1909, before the patents for the said lands were approved by the Secretary and before the said

patents were recorded as required by Section 5 of the Act of Congress, approved April 26, 1906, entitled: "An Act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for Other Purposes," and holding and deciding that a deed so executed conveyed title.

As shown by the record on pages 2 and 3, it was alleged in the complaint of plaintiff below that on the 27th day of March, 1909, there was duly issued in the name of said Mahaly Watson, signed by the Principal Chief of the Creek Nation on the 10th day of March, 1909, and approved by the Secretary of the Interior on the 24th day of March, 1909, patents for the lands involved in this suit; and on the 22nd day of March, 1909, Hannah Canard made this deed to Sims, which said deed was filed for record on the 26th day of March, 1909, and recorded in Book 31, page 104. Thus it is shown that these patents were issued the 27th day of March, 1909, though dated the 10th day of March, and were approved by the Secretary on the 24th of March, 1909, and we have shown that said patents were recorded on the 27th of March, 1909. It is also alleged by plaintiff below that Hannah made this deed to Sims on the 22nd of March, 1909, and that he recorded the same on the 26th thereof. So this deed was executed before said patents were approved by the Secretary or recorded, and the same was even recorded in Book 31, page 104, before said patents

were recorded. In section 23 of the Original Creek Agreement it is expressly provided:

“All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the rights, title, and interest of the United States in and to the lands embraced in his deed.”

As heretofore shown, the title to lands arising under this Act of April 26, 1906, remained in abeyance until the patents therefor were recorded as directed in section 5 thereof and then they were to be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same, as therein provided. Here it will be observed that this deed was executed to Sims even before said patents had been approved by the Secretary of the Interior, and before said patents had been recorded and before delivery to the party entitled thereto under the directions of said section. Therefore it here appears that said deed to Sims was executed on March 22, 1909, before the title of the United States and Creek Nation to such lands had ever been divested under section 23 of this Original Creek Agreement, as such patents had first to be approved by such Secretary before the title of the Government was thereby relinquished. It further appears that Sims put this deed of record on March 26, 1909, before such patents were recorded, thus showing that he had fully accepted said deed and placed the same of record while the title of the gov-

ernment was still vested in it, and at a time when Hannah Canard Barnett had no title to such land and could not convey any by said deed. Said deed, being in violation of said acts, in these particulars vested no right, title or interest in said Sims; and whatever right, title or interest Hannah Canard acquired in or to said land after March 22nd, 1909, was not conveyed and did not pass under said deed, as so held by this court in *Starr v. Long Jim* and other of its decisions hereinbefore cited. Hence, as Hannah Canard Barnett had no right or title in said lands on March 22, 1909, and most certainly did not then have the legal title thereto, said deed did not convey the same or any interest in said lands, but the same was absolutely null and void under section 5 of the Act of Congress of May 27, 1908, and section 5 of this Act of April 26, 1906, and said section 23 of said Original Creek Agreement; and being void, could not be legally approved under said section 9 on June 17, 1913, or at any other time prior or subsequent thereto and is still utterly void, and the title to said lands is still vested in Hannah Canard Barnett. There is no provision in said Act of Congress of April 26, 1906, under which this allotment was made and arose, whereby an allottee can, under said act, acquire a separate *equitable estate* to such allotment; for the legal title thereto, provided in said section 5, which doubtless means all the title to such lands, is held in abeyance and still vested in these governments until such patents are recorded, as therein directed.

THIRD ASSIGNMENT.

In holding and deciding that said deed could be and was legally approved by the county judge of Okfuskee County on the 17th day of June, 1913, at his home and residence and not in open court; and in holding and deciding that said deed did not have to be approved by the County Court of Okfuskee County in open court; and in holding and deciding that the purported approval of said deed by the said county judge at his home was sufficient compliance with the provisions and requirements of Section 9 of the Act of Congress, approved May 27, 1908, entitled: "An Act for the Removal of Restrictions From Part of the Lands of the Allottee of the Five Civilized Tribes, and for Other Purposes."

This assignment has already been quite fully discussed in the previous part of this brief in connection with the matters arising under the first assignment; and as this particular feature is fully discussed and citations of authority cited pertaining thereto, in the supplemental brief, thus enlarging and amplifying what we have previously said herein, we will desist from any further discussion of this assignment at this time further than simply to emphasize the vast importance of the matters involved in this third assignment. If the full-blood Indian heir can be induced to, or inveigled into, signing a deed for his restricted inherited lands, and then that deed can be taken by his grantees or anyone else claiming under him to the county judge and

then present his own petition for its approval, or a petition fraudulently obtained from the heir for such purposes, and thereby procure a valid approval of such deed under section 9 of said Act of May 27, 1908, without the knowledge of such heir, and after such heir had instituted legal proceedings in a court of competent jurisdiction to cancel and set aside such deed before approval thereof as therein provided, and such county judge and not such County Court can anywhere in his county and in the absence of such Indian heir and without his presence, or with his presence fraudulently obtained and procured as in this case, and without even such deed being before or examined by such county judge at the time of such approval as in the *Snell* case, and all this can be done under said Sec. 9 of said Act of May 27, 1908, and thereby such a deed be made perfect and the title to such lands to vest in such grantee, then any such a deed of such full-blood heirs can be approved *at any time* after the same was simply signed by such heir, and that, too, without his knowledge or consent and against his strenuous protest; his legal proceedings previously instituted for the cancellation of such deed on any grounds whatever would meet the same fate and thereby be completely nullified; thereby the full-blood heirs would receive no protection whatever under said section 9, but the benefit and protection therefrom arising would inure to the use and benefit of his grantee and his subsequent vendees thereunder, and not to said full-

blood heirs, regardless of the consideration for said deed or the way and manner in which such a deed was procured or obtained by such grantee. If a valid approval of such a full-blood Indian heir's deed can thus be obtained under said section 9, without such approval proceedings being known or understood by such heir, as in the case at bar, or without the knowledge or consent and in the absence of such heir and without the deed being present or considered by such judge at the time of such approval, and after such heirs have instituted suits for the cancellation of such deeds, as in this and the *Snell* case, and then such approvals be upheld by the courts of the land as perfectly valid under said section, it is difficult to see or discover how such full-blood Indian heirs or their restricted lands are, or ever can be, protected and safeguarded by said Act of Congress, as was evidently intended by Congress they should be protected not only against the improvidence of the heir himself, but the avaricious and craving desires of designing persons dealing with him in such matters. It has often been held by this and other courts passing upon such Indian affairs and the construction of these laws of Congress that such restrictions contained therein were intended by Congress for their protection and safeguarding their restricted lands for their use and benefit. Then it could not have been for the protection and benefit of their fraudulent grantees in violating such acts.

In the case at bar there can be no dispute in the fact that this approval of June 17, 1913, was made by Judge Smith himself and took place at his home and residence and while he was there confined to his bed and unable to leave his home because of the serious sickness of which he died in July thereafter. It is shown by the record conclusively that the County Court of Okfuskee County had adjourned for the term on May 20th, 1913; and under the laws of the state the same could not be reconvened during that term, as shown in the supplemental brief, and was not reconvened or judicially opened for the July term thereof. The same was true in the *Snell* case. But, in that case and in *United States v. Black*, it is held that the County Courts of Oklahoma are always open for probate business, and hence, the judge thereof can approve such deeds, even though such County Courts are not in session for other purposes. But in *Molone v. Wamsley*, 195 Pac. 484, it was held by said Supreme Court that in approving such deeds such County Courts do not exercise any probate jurisdiction conferred upon them by the constitution and laws of the State of Oklahoma, but merely act as federal agents, and their approvals are simply ministerial. In the opinion in this *Snell* case on this feature said court observed:

“In approving full-blood conveyances the County Court does not exercise any jurisdiction of any character conferred by the constitution or laws of the state, but acts simply as a fed-

eral agent, but the County Court in its probate capacity is the court which has jurisdiction of the settlement of the estate of deceased allottees, and as such, is the federal agency designated by the Act of Congress; and as such has authority to approve the full-blood conveyance. In its probate capacity the County Court is always in session and has at all times the authority to approve a full-blood conveyance in the exercise of the ministerial function given by the Act of Congress."

If "in approving full-blood conveyances the County Court does not exercise any jurisdiction of any character conferred by the constitution or laws of the state, but acts simply as a federal agent," and such act of approval is simply *ministerial*, as thus held in the *Molone* and *Snell* decisions, it is extremely difficult to see or understand how such County Courts in their probate capacity, when acting simply as a federal agency under said Act of Congress, have authority to approve such full-blood conveyances, when such County Courts are not in session; for, as such courts when so approving such deeds do not exercise "*any jurisdiction of any character conferred by the constitution or laws of the state,*" as thus held in the *Snell* case and substantially in the *Molone* case, then they do not exercise probate jurisdiction any more than any other jurisdiction; and as they do not, according to these decisions, exercise any jurisdiction of *any character* thus arising from said constitution or laws, the

probate capacities of such County Courts are as much in abeyance and dormant, in such approvals, as any of its other capacities which extend to both civil and criminal matters, as well as to probate matters under said constitution and laws of said state. We think it is absolutely correct to say and hold that in such approvals such County Courts and therefore the judges of said courts do not and cannot exercise any jurisdiction of any character arising from the state constitution or state laws. If so, then in so doing it is too evident for dispute that it no more exercises its probate capacity than its other capacities; and, therefore, that provision of the state law which provides that such courts are always open for probate business, cannot possibly have any application, force or effect whatever upon such courts when engaged in the approval of full-blood Indian deeds. It is rather an anomalous position to hold that in such approvals such courts do not exercise jurisdiction of any character arising under the constitution and laws of Oklahoma, and then undertake to invoke and apply its probate capacity arising therefrom in performing such approvals. To hold that such approvals by such courts in recess thereof can be exercised because of this probate capacity, and at the same time to hold that when so acting they are simply federal agencies and their acts of approval are simply *ministerial* and wholly independent of such state laws, while their acts done in such probate capacity under the constitution and laws

of the state are *judicial* and fully effectual for all purposes, presents a legal proposition difficult to understand or apply. This seems to us like a self-contradiction, and therefore absolutely untenable.

Under the decision of this court in *Parker v. Richard*, *supra*, it is forever settled that in such approvals such courts are simply *federal agencies*, and as such derive their powers from said section 9, and not from the constitution or laws of the State of Oklahoma, or, in fact, any other state. But such powers were conferred upon the "court having jurisdiction of the settlement of the estate of said deceased allottee," and not upon the judge of that court, as is conferred upon him in section 8 thereof as to the approval of Indian wills. Here Congress made a well-defined distinction in the powers thus given in these two sections of said act. As to the approval of wills the power was given to the judge of the County Court of Oklahoma, while as to the approval of such Indian deeds that power was conferred by section 9 only upon such courts; and in this section it is not restricted to such courts of Oklahoma, as is done in section 8 as to such wills. The adjective phrase, "having jurisdiction of the settlement of the estate of said deceased allottee," following the word "court" in section 9, was used by Congress advisedly, and simply designates the court thus having power to approve such deeds, regardless of what such court might be, just so it had the jurisdiction to settle such estates. That court

happened in Oklahoma to be the County Court, while in some other states, or countries, it might be some other court. But it is wholly immaterial what should be the name of that court, whether County Court, probate court or District or any other court, just so it had jurisdiction to settle such estates, such powers were thus conferred upon it. If such deceased allottee should at the time of his death live and reside in some other state, or country, and have his place of abode there and there was a court in that jurisdiction having jurisdiction to settle his estate, that would be the court upon which jurisdiction was conferred under this act to approve the deed of his full-blood heirs, even though his allotment should be in Oklahoma. In such state, or country, there might not be any provision that such probate court, whatever it should be, was always in session for probate business; and then these *Molone* and *Snell* decisions would have no application whatever where such court was not in session; for, not being in session, it could not legally act in any capacity, neither under its own jurisdiction nor as a federal agency under said act, as a dormant court, while it may exist in contemplation of law, cannot act in any capacity neither judicially nor ministerially. This, again, shows the fallacy of all said decisions holding that said approvals can be made by the judge of such courts and especially the judges of such County Courts of Oklahoma, and particularly when such courts are not in session at all.

This *Snell* decision goes still further and, in effect, holds that it is not necessary for the Indian grantor to be present at such approvals or have any knowledge thereof, or that the instrument itself be present and before such court or judge; that such approvals may be legally obtained upon the petition of such grantee and without the knowledge of such Indian grantor, and that, too, ten years after the date of said deed, and after the Indian grantor had instituted her suit, as in the case at bar, for the purpose of having said deed cancelled and set aside, and after she had employed counsel therefor and given a valid contract for a contingent fee of one-half of the lands involved as his services therein. And that upon such surreptitious approvals, the same would relate back and perfect the title of said lands as of the date of said deed, regardless of the fact that in the interval the values of such lands may have increased enormously. In the first decision of the Circuit Court of Appeals in the case at bar, that court pointed out that the increased value of the lands after the date of the deed and before its approval should be taken into consideration in making said approval; and in *Lykins v. McGrath*, *supra*, this court, in defining the duties of such federal agencies in the approval of Indian deeds, pointed out that such agencies should consider at least four things, namely: *First*, whether it was advisable to permit the Indian to sell said lands at all; *second*, to see to it that the consideration therefor was

ample; *third*, to see to it that the Indian actually received that consideration; and *fourth*, to see to it that such transaction was not unduly qualified or likely to lead to unreasonable conditions, etc.

Thus, again, showing in this *Lykins* case that it was in the rights and interests alone of the restricted Indian such agencies were concerned, and as to which alone they must act, and only have power to act, under such Acts of Congress. If such an agency is actuated to act in any other respect than for and on behalf of the Indian, or in the interest of said grantee or others, its action of approval is *ultra vires*, and therefore not the exercise of the powers thus given under the acts and consequently are absolutely null and void, and would fail to operate as an approval of such deeds under such Acts of Congress, because of the attempted misapplication of these federal powers thus given in the Act.

But perhaps after all, these decisions and particularly this *Snell* decision, will serve to show the defenseless condition and position of these helpless Indians and the unprotected condition of their restricted lands under these acts; for, if such Indian once signs a deed for his restricted lands capable of being so approved, his rights and interests in the lands therein described and the protection given him under the Acts of Congress, are practically at an end and a thing of the past as soon as he signs such deed; if in fact, under said Acts of Congress

as held in said decisions, his grantee or some remote vendee thereunder can, without the consent or knowledge of the Indian grantor and over his protest, secretly take such deed, or in fact, go without such deed at all, to the judge of the proper County Court and have him sign an approval thereof in the name of such court and that operate as a legal approval under said acts and convey the title to such lands and all rights therein as of the date of such instrument. This is most certainly true, if the suit of such Indian heir brought to recover his inherited property at a time when the heir has the absolute fee simple title thereto and a perfect legal right to bring such suit and to recover such lands and to cancel a previous void deed therefor, can be legally defeated and all his rights in such lands and to bring such suit can be nullified, simply by the grantee in said deed, or some other person remotely interested thereunder, by secretly and without the knowledge or consent of such Indian grantor applying to such County Court or judge thereof after such suit was brought and thus procure a valid approval of such deed which relates back to the date of such deed, as was done in this and the *Snell* cases, such conditions will render such Indian heirs helpless and absolutely unprotected under said Acts of Congress, for if under such circumstances an intervening attorney in such case for a contingent fee in such lands is likewise defeated and his fee utterly destroyed, few reputable lawyers would care to take such cases and

bring such suits knowing that at any time after bringing the same and most likely after expending large sums of money therein, he could thereby be defeated and his fees destroyed and his services and expenses lost. It is a fact so universally known that the courts can almost take judicial notice thereof that these allotments of the Five Civilized Tribes were plastered over with thousands of illegal deeds therefor, as shown in the thirty thousand land suits instituted by the government of which *Heckman v. United States*, 224 U. S. 413, 56 L. ed. 820, and other such suits are examples. While many of those suits were successful and under which quit claim deeds were executed back to such Indians and thereby such lands relieved, still thousands of such deeds remain and are in existence today, of which the deeds involved in these cases exemplify. Many of such deeds were obtained for a trival consideration as shown in these cases, and some without consideration or by fraudulent means which would not bear the investigation of a court of justice; and many of them are utterly void. But if such deeds can at the instance of such grantees or those claiming under them be legally approved by the secret action of such grantees and the judges of said courts, and that too, without the knowledge or consent of the Indian grantor and without producing the instrument itself which is to be approved, as done in the *Snell* case and now upheld by the decision of said State Supreme Court, then all such deeds can be so approved

and thereby such Indians utterly deprived of their lands and the safeguards for their protection in said Acts of Congress would thereby be nullified; and if such can be done ten years after the execution of such deed, as in the *Snell* case, then it can be done at any time however remote from the date of said deed, with the same disastrous results. We do not believe that any such proceedings or results were ever intended by Congress when passing these various acts and when so carefully providing therein for the protection of its Indian wards. If not, then it can not be done; and these decisions are clearly erroneous.

The Supreme Court of Oklahoma and the legislature of said state have shown a decided disposition to safeguard and protect these Indians and their restricted lands, by said court in 1914 making rules under authority in said state constitution for the government of subordinate courts of said state, among which were Rules 9 and 10 thereof, directing such County Courts how to proceed in the approval of such Indian deeds, and by which such approvals had to be upon the verified petition of the Indian grantor, with power in such court to compel the presence and testimony of such heirs, and requiring the publication thereof, in order that the Indian heir might thereby have knowledge of such proceedings, be protected therein and receive just compensation for his lands. By Chap. 198, of the Session Laws of 1915, said legislature passed an

act of like import and for such purposes. Under these rules and this act of the legislature the Indians were protected as provided in said Acts of Congress; and the same were most highly beneficial to such Indians on such approvals. But in *Haddocks v. Johnson*, 194 Pac. 1077, this act of the legislature was held to be beyond the power of the legislature to enact any law affecting such conveyances made and approved in conformity with the Acts of Congress and thereby nullified said act; and in *Molone v. Wamsley*, 195 Pac. 484, these rules of the Supreme Court were held inapplicable to such approvals and therefore of no effect, and, therefore, approvals made in violation of such rules or said act of the legislature would not be held void for that reason. But, under the decisions of this court in *Butte City Water Co. v. Baker*, 196 U. S. 120, 49 L. ed. 409, and *Gustav Holmgren v. United States*, 217 U. S. 507, 54 L. ed. 861, we believe said rules of said court and said act of the legislature were valid and enforceable and not only consistent with but in perfect accord and support of the intent and purpose of Congress expressed in said several acts thereof, and greatly aided in carrying out not only the express provisions of said acts but the very spirit and policy thereof.

FOURTH ASSIGNMENT.

In holding and deciding that "the former appeal settled that * * * the approval could be made at the residence of the judge," and in holding and deciding that the decision rendered upon the former appeal settled or affected the questions here presented or any of them.

The first appeal taken in this case to the Circuit Court of Appeals was simply from an order, or judgment, of the District Court on a motion of appellees for a judgment on the pleadings, as shown by the decision therein, in 259 Fed. 394. This, of course, tested the form of the cross-complaint of appellants and whether or not the same stated a cause of action on their behalf. It was decided by said appellate court that it did state a cause of action and gave potential reasons therefor. So, that, the merits of this cause were not then before said appellate court for final decision as the same had never been tried. In that decision the court was very pronounced in its opinion of the fraud charged in said cross-complaint and held that if the same were substantiated, such approval obtained thereby was a nullity as therein shown. But this, by no means, settled the issues as to such fraud and the same had to be tried after the case was so remanded; and we take it that it was practically the same as to the other matters discussed and decided therein. But even if it was otherwise, such matters would now

come before this court on this appeal, as said first decision of said court was not final, but the case was remanded to the trial court and had to be tried and again brought before said Circuit Court of Appeals, as was done, before the decision therein became final and therefore appealable to this court. In the companion case of *Harjo v. Kunkel* as to the Annie Bird allotment which was tried and appealed at the same time, and in which it was held that one of the appellants had no interest in said allotment, but that said allotment had been inherited entirely by said other appellant, we appealed to this court directly from said decision of the Circuit Court of Appeals after it had remanded it but before the same was again tried by the trial court; and this court dismissed said appeal for want of jurisdiction, as may be seen in 254 U. S. 620, 65 L. ed. 442; that was a judgment of the court below on a motion of the appellees for a judgment on the pleadings, the same and at the same time, as the case at bar, and was, likewise, reversed and remanded by said Circuit Court of Appeals. So there has never been but one trial of this case in the District Court and from that we appealed again to said Circuit Court of Appeals and are now appealing from its decision in said cause. But, whether these matters arising under this assignment were finally settled in its first decision by said Circuit Court of Appeals, what is said in its last decision pertaining thereto would operate as a decision thereon adversely to the appellants.

But, as such matters arise under the other assignments herein, we will not discuss them further at this time.

FIFTH ASSIGNMENT.

In holding and deciding that the burden of proof of fraud alleged in these proceedings rested upon the appellants; and in holding and deciding that "the fraud alleged consisted in causing Hannah Canard Barnett to believe that the instrument presented to the court for approval was something other than a deed to the property"; and that "the fraud alleged was not proven but the substantial weight of the evidence is to the contrary," the record fully showing that said lands were restricted under said Acts of Congress mentioned in the cross complaint of appellants; that said appellants were Creek citizens; and that Hannah Canard Barnett was a full-blood Creek Indian and owner of said lands under said acts, and the burden of proof herein is governed by section 2126 of the Revised Laws of the United States, which is as follows:

"In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

The record in this case conclusively shows that the appellants were Creek Indians and that the ap-

pellees are a white man, Kunkel, and a corporation, the Prairie Oil & Gas Company; and the record, likewise, shows conclusively that the property involved in this suit once belonged to the appellant, Hannah Canard Barnett, the other appellant, Tucker Barnett, being her husband and only a nominal party to this suit, although a Creek Indian. If this section, 2126, here set forth in said assignment is applicable to the Five Civilized Tribes, then the Circuit Court of Appeals was in error in holding that the burden of proof in this case, in any respect, was upon the appellants. Most certainly, the burden of proof in showing the title and interests of appellees and that they were innocent purchasers was not upon said appellants but rested upon said appellees, as shown in the first decision of said court in this case and by the decisions therein cited and relied upon. It held that the plea of *bona fide*, or innocent purchasers, was an affirmative defense to said cross-complaint, and under their reply the burden of proving the same was upon said appellees and being the plaintiffs in the suit must stand on and prove the strength of their own title. Whether Hannah Canard Barnett was ever legally in possession of said allotment at any time prior to March 22, 1909, or thereafter, is, perhaps, a matter of construction of said Acts of Congress, The allottee, Mahaley Watson, being just a mere infant at the time of her death could hardly be said to have been in possession of said lands; and as her mother was her sole heir, but

did not have the legal title thereto until after the date of said deed, it is questionable whether she ever had the legal possession thereof at any time. But that she was the owner thereof is not denied, but, in fact, is affirmatively shown by appellees in their own pleadings. Hence, she comes within the purview of said section 2126. It is our contention that said section applies to the Five Civilized Tribes, as well as to all other tribes of Indians, there being no limitation or exception therein excluding them. But this is a matter of construction for this court. It is a feature of law of the very greatest importance in these Indian matters and where fraud upon them is practiced without stint or the slightest compunction, it is one of the shields to these Indians provided by Congress in order that they may thereby be protected; and, it was competent for Congress to lay down such a rule. This court, itself, has given several rules applicable especially to these Indians and their affairs, commencing with the old case of *Worcester v. Georgia*, 6 Pet. 515, holding, in effect, that these Indian treaties must be construed in the way most likely understood by the Indians, and followed up again in *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 62, where the same is held and enlarged by holding that the same must be construed as the Indian most likely understood them and not as they would be understood or construed by learned lawyers. In *Kansas Indians*, 72 U. S. 5 Wall. 753, this court said: "*The conduct of Indians is not to be*

measured by the same standard which we apply to the conduct of other people;" the same was again held in *Felix v. Patrick*, 36 L. ed. 726, where this expression was quoted and relied upon.

In *Hickory v. Campbell*, 182 Pac. 233, point 9, it was held by the Supreme Court of Oklahoma, that:

"The watchfulness and vigilance of a court should be quickened when dealing with an estate of full-blood Indians, whose knowledge of the English language may be totally lacking or deficient and whose timidity to appear in court is well known and whose experience in the affairs of life has been limited."

These Indians are so densely ignorant, impractical and unaccustomed to the ways of civilized life that if in practice and particularly in the admission of evidence, the strict rules thereof were strictly applied to them in their suits, it would result in practically a denial of justice. Nearly all of these older Indians can neither read, write, speak nor understand the English language, or in any manner converse therein, as is the case with Hannah Canard Barnett; and knowing nothing of the ways and manner of doing business with the white population and not understanding even what they observe in in such matters, they become an easy prey for designing persons and a stupendous failure in disclosing the merits of their own cause both to their counsel and to the court on the trial thereof. Because of their illiteracy, stupidity and ignorance of these

matters, they have but little idea what facts are to their benefit and those against them. So in testifying they are liable to even testify against themselves without knowing it or understanding the nature of what they have said. Their mode of thinking and reasoning is the very reverse of the white man; and when testifying, unless the interpreter also understands these matters distinctly and at the same time these customs and habits of the Indians, he is more liable to mislead the Indian witness than to be of assistance to him in interpreting questions asked him. This is the common experience with these Indians; and for that reason great latitude should be allowed in weighing their testimony. We believe this is generally known wherever the Indian is known and his habits and customs understood. Hence, as a relief against such a condition, Congress evidently passed said section 2126; and in these Acts of Congress pertaining to these Five Civilized Tribes provided that certain contracts, agreements, or conveyances should be *absolutely void* and not susceptible of ratification and no rule of estoppel should ever be applied to prevent the assertion of their invalidity, section 16 of Supplemental Creek Agreement; and be *void*, section 19 of the Act of April 26, 1906, and be *absolutely null and void* as provided in section 5 of said Act of 1908. It having been first shown and admitted that the lands involved belonged to Hannah Canard Barnett, but now claimed by appellees, we believe under these laws that the burden was on the

appellees to show that they had a valid title to these Indian lands, and in so doing establish that the approval required by the Act of Congress was legally obtained. Most assuredly, they, being plaintiffs below, had to show that they held the legal title to the lands before they could be or defend herein as innocent purchasers and that they held against a person *sui juris*. In this they absolutely failed; but on the contrary it is conclusively shown that they do not now have the legal title to said lands and that the original grantor thereof was, when said deed was executed, and ever thereafter, and now, *non sui juris*. Under these Acts of Congress these lands were unquestionably restricted and their alienation forbidden, except as provided in section 9 of said Act of 1908. Appellees are now claiming said lands in this case, and to show their legal right thereto and to the possession thereof they tender this deed and this approval of June 17, 1913. They are objected to as invalid and for numerous grounds and reasons, as shown on pages 72, 73 and 74 and thereafter. If they succeed at all it must be because both of said instruments are valid under said Act of Congress. Why is not the burden of proof on them to show the validity of their instrument on which they rely in this case? It requires but an inspection of said deed in connection with said Acts of Congress to show without any other proofs that that deed is invalid and does not convey what it purports on its face and what appellees are now claiming under it. This is a mat-

ter of construction for the court and its validity depends upon that construction and not upon any extraneous evidence or proof. If the deed for any reason was invalid, then it follows as a matter of course, and irresistibly, that said approval of June 17, 1913, was, likewise, invalid and not a compliance with said Act of Congress; and that consequently appellees have no title to said lands and no right to the possession thereof but must account therefor to the appellants for every gallon of oil they have taken therefrom and at the highest market value therefor at any time before final decree herein, as provided in the statutes of Oklahoma, which perhaps governs the measure of damages in this case. The statutes of Oklahoma on damages was adopted from South Dakota and the same was construed in *Golden Reward Mining Co. v. Buxton Mining Co.*, 97 Fed. 403, justifying the highest market value as therein provided, citing *Mining Co. v. Turck*, 70 Fed. 294; *Durant Mining Co. v. Percy Consol. Mining Co.*, 93 Fed. 166, and *Bowles Wooden-Ware Co. v. United States*, 106 U. S. 432, 27 L. ed. 230.

So, that, it seems immaterial in this particular case on whom rested the burden of proof in this entire case, as the appellees have failed to show their title to the land is good and valid, and on the other hand we submit that appellants have shown not only that appellees have no title, but that they have title to the land and are the owners of said lands and

a right to the immediate possession thereof, as said deed and said approval thereof were invalid for the reasons herein set forth.

SIXTH ASSIGNMENT.

In holding and deciding that the evidence herein adduced did not show fraud in the procurement of said alleged approval of said deed on the 17th of June, 1913, by the judge of said County Court at his home and residence, and not in open court or by said court; and in failing and refusing to hold and decide that said purported approval was procured by fraud thus practiced upon said appellants, said judge and against said Acts of Congress, approved May 27, 1908, and April 26, 1906, respectively.

This assignment is divisible into two parts, *first*, in holding and deciding that the evidence herein fails to show fraud in the procurement of said alleged approval of said deed on the 17th of June, 1913; and, *second*, in failing and refusing to hold and decide that said purported approval was procured by fraud thus practiced upon appellants, upon said judge, and against said Acts of Congress.

That part of the decree, or opinion, of said Circuit Court of Appeals relative to fraud herein is as follows:

“The claim of fraud is made by appellants and the burden of proof as to that issue was upon them. The fraud alleged was in procuring the approval of the deed by the judge of the

County Court. The fraud alleged consisted in causing Hannah Barnett to believe that the instrument presented to the court for approval was something other than a deed to the property. In our judgment, the fraud alleged was not only not proven but the substantial weight of the evidence is to the contrary. This view of the issue as to fraud disposes of the case and makes it unnecessary to determine the sufficiency of the defense that the appellees are innocent purchasers.

“The decree is affirmed.”

Here it is expressly held that, *“the fraud alleged consisted in causing Hannah Barnett to believe that the instrument presented to the court for approval was something other than a deed to the property.”*

In fact, the matters thus set out and considered by said Circuit Court of Appeals, was not the fraud alleged by appellants at all in their cross-complaint; and there is nothing in said cross-complaint about substituting one paper for another, or that the instrument presented was something other than a deed for the property. Said court evidently got a misconception of the fraud charged in this case and also the nature of the allegations contained in the cross-complaint, and therefore necessarily reached an erroneous conclusion. The cross-complaint does state, in effect, that Hannah Canard Barnett was deceived into executing a deed for the allotment of Mahaley, when she supposed the deed she signed was for the

allotment of her deceased father, Hully Canard; that she never intended to sell the allotment of her deceased child and never received the \$500.00 mentioned in said deed, and did not know that such deed embraced said allotment until shortly before bringing said suit, as shown by paragraph 3 of said cross-complaint of appellants which is as follows:

“III. That Hully Canard was likewise a member of said tribe and received an allotment out of the domain of the Creek Nation, and died long prior to the death of said child, Mahaley Watson, intestate, and left him surviving said defendant, Hannah Canard Barnett, his daughter, and Sallie Canard, his wife; that after the death of said child, one B. O. Sims came to said defendant and her mother, Sallie Canard, and sought to purchase said allotment of said Hully Canard, whereupon said defendant and her mother agreed to sell the same to him and were by said Sims induced to go to the town of Holdenville, Oklahoma, to make and execute a deed therefor to him, and to have the same approved by the County Court of said Hughes County, Oklahoma; that on the 22nd day of March, 1909, said defendant and her said mother did go to said town and executed a deed to said Sims for said Hully Canard allotment and said County Court of said Hughes County undertook to approve the same on said date; that it now appears that another instrument in writing for said allotment of said Mahaley Watson appears of record in the office of the register of deeds of said Creek County, Oklahoma, in book 31, at page 104, and therein filed of record on March 26, 1909, and purports to be a warranty deed to

said Sims for said allotment of said Mahaley Watson, dated the 22nd day of March, 1909, and purporting to have been signed and acknowledged by said defendant Hannah Canard Barnett, in the name of Hannah Canard, and is the same deed mentioned and referred and relied upon by complainant in his bill and amended bill filed in this cause; that said deed purports to have been executed for a consideration of five hundred dollars recited upon the face thereof, but said defendant, Hannah Canard, never received said consideration for said lands therein described, or any part thereof, and now has no recollection whatever of ever having made or executed said deed, although not being able to read or understand the English language, she may have signed the same without knowing its nature or character or that it was a deed to said Sims for said allotment of said Mahaley; that it was not the intention or purpose of said defendant to sell or convey said allotment to said Sims on said date in said town or to make and execute him a deed therefor, but to make and execute him a deed for said allotment of said Hully Canard only, and at said time and place; that said defendant did not discover that said deed was thus of record for a long time after the same purports to have been thus made and executed, and then employed counsel to recover the same, as hereinafter set forth; that often both before and after the date of said deed, said defendant was solicited to sell and convey said allotment but as often refused to do so, as she desired and intended to keep said allotment as it was the lands of her deceased child; and defendants allege that if her name was signed to said deed, she was induced to sign the same with-

out knowing it was a deed to said Sims for said allotment, and would not have signed the same had she known it was a deed for said lands but would have refused to sell or convey said lands to said Sims or to any other person; that said deed now purports to have been approved by the County Court of said Hughes County on said date, to-wit, the 22nd day of March, 1909, but said defendant has no recollection of any such proceedings; and never intended to have said deed approved before said County Court of Hughes County or before any other County Court of said state or otherwise."

Here the charges, in substance, are that she and her mother sold to Sims the Hully Canard allotment and at his request went down to Holdenville to have a deed therefor made and approved before the County Court of Hughes County; and that she afterwards discovered this deed for the Mahaley Watson allotment which she never intended to sell, did not sell but often refused to sell the same and did not receive the \$500.00 recited on the face of that deed as the consideration therefor; that she has no knowledge of signing that deed, but as she could not read or understand the English language, she may have done so without knowing that it was for the Mahaley Watson allotment. This, in fact, is stating a fraud of the gravest character thus practiced upon her in the procurement of said deed. But there is nothing therein stated, or elsewhere in said cross-complaint, that said deed for the Watson allotment was substituted for some other instrument, as ap-

pears to have been in the mind of the learned judge who wrote that opinion and perhaps in the mind of said court. This cross-complaint is sworn to by appellants and thereby has the seal of sacred testimony. The reply to said cross-complaint of said appellant, Kunkel, begins on page 61 of the record, and that of the Prairie Oil Company on page 64 thereof; and in their reply to this paragraph 3, a greater part of which is above quoted, said Kunkel states as follows:

“He denies all the allegations in paragraph III, of said cross-bill and further says that the said allegations in said paragraph are immaterial and in no way affect the title of the cross-defendant to the lands in controversy for the reason that said cross-defendant is a *bona fide* purchaser of said lands under a deed duly approved by the County Court having jurisdiction in the premises, as hereinafter pleaded and set forth.”

And as to said Prairie Oil & Gas Company, as follows:

“It denies all the allegations in paragraph III of said cross-bill and further says that the said allegations in said paragraph are immaterial and in no way affect the title of the cross-defendant to the lands in controversy for the reason that said cross-defendant is a *bona fide* purchaser of its title thereto as hereinafter pleaded and set forth.”

Here appellees in these replies seek, *first*, to deny generally all the allegations in paragraph III of said cross-bill, and then set up that they are *bona*

fide purchasers of said lands and title respectively and that, therefore, the allegations in said paragraph III, including the above quotation, are immaterial and in no way affect the title of cross-defendants to the lands in controversy. Here this general denial is ineffectual because prohibited under the rules of practice in equity and, particularly, rule 30 thereof prohibiting any general denial of the averments of the bill but requiring that they be specially admitted, denied or explained, unless without knowledge thereof, in which case he shall so state, and such statement shall operate as a denial. They next seek to plead the defense, or present the plea, of being *bona fide* purchasers and say that the allegations, charges and facts set forth in said paragraph III were immaterial and in no way affected the title of appellees. But they failed to plead that they had paid a valuable consideration therefor in said reply to said paragraph III and failed to show or state the consideration they had paid or that they had parted with anything of value, in connection with said paragraph III, and said paragraph is nowhere else mentioned or referred to in said respective replies; nor do appellees state in said respective replies above quoted that they were not parties to this fraud and deception set forth in said paragraph III, and do not state that they had fully paid prior to said suit a consideration for their deed or lease or the date of the same, in said replies to said paragraph III. On pages 125 and 126 of the record

appellants complained of this defect of such *bona fide* plea and objected to any evidence thereof and pointed out the defects therein. But the trial court overruled such objections and appellants excepted; and the trial court gave appellees leave to so amend such pleas as shown on said page 126 to which appellants again excepted. But such amendments thereto were never made; and such pleas still remain in the record as originally.

As previously stated, owing to a confusion arising out of an almost continuous colloquy among counsel and the court on the trial of this case, as is shown by the record, the matters in this third paragraph were overlooked, and when on the witness stand Hannah Canard Barnett was not asked anything about them and so did not testify anything about them. To that extent, her testimony on such matters failed in the trial of this case. But under the view we take of matters, verbal testimony pertaining thereto was perhaps not necessary to establish said charges contained in this paragraph III, as said cross-complaint was duly sworn to by appellants and there was no proper denial thereof, or defense thereto; in which case they stood confessed, and said court thereby was in error both in holding what this fraud alleged in said cross-complaint consisted of and the proofs thereof. If in this we are correct then the fraud thus charged in said paragraph III is amply sufficient to set aside said deed and defeat the interests claimed in said lands by

said appellees; for it is our contention, as heretofore stated and as more fully presented in our supplemental brief, that fraud, deceit or misrepresentation in the procurement either of an Indian deed for his restricted lands or the approval thereof, will vitiate such instrument *in toto* as to which such fraud is practiced, and if it be a deed, such deed being thereby rendered void, could not be approved under said act; and consequently both said deed and approval would be rendered void by such practices. Fraud in the procurement of an Indian deed for his restricted lands or in the approval thereof is nowhere allowed or permitted in said Acts of Congress. But on the contrary a deed, contract to sell or any other instrument affecting the title to such lands, made either before or after this Act of 1908, and before restrictions are thus removed from said lands, is absolutely null and void, and is expressly so provided in section 5 of said act. Hence, being thus absolutely null and void, because obtained by fraud and therefore necessarily in violation of said act, the same even though approved, could not and would not operate as the removal of the restrictions from the lands embraced in such deed; and such lands being still restricted after the execution of such a deed and the title thereto still remaining in the Indian heir, a suit to cancel such deed and recover such lands could be maintained by the Government as the sovereign power and right of action therein would still be retained by the Government. But if it should

be held that such deeds or approvals thus procured by fraud, deception or misrepresentation were simply *voidable* and not *void* as expressly so declared by the acts, then an innocent purchaser from such fraudulent grantee would, as in ordinary cases, become the true owner thereof, and the Indian heir would thereby lose his lands by the fraud thus practiced and the Government lose its right of action, for the restrictions must be removed by the approval before the title to such lands will pass or such deeds become valid under section 9 of said Act of 1908. If the restrictions were or could be thus removed and such lands pass into the hands of the truly innocent purchaser, then the sovereignty of the Government over such lands and such Indian heir would subside, and the sovereignty of the State of Oklahoma instantaneously arise over both said lands and said heir so far at least as concerned said lands. Thereafter the Government could not maintain its suit in said premises as such restrictions would thus be removed and the Government no longer have any control over the same, as was held by this court in *United States v. Waller*, 243 U. S. 450, 61 L. ed. 843. Hence, the legal consequences of such fraud, deceit and misrepresentation must leave the whole title to such lands still vested in such full-blood Indian heir, subject to the restrictions thereon imposed by such Acts of Congress, the same after procuring such deed or its approval by fraud as it was before the execution thereof. Any other view or holding

in these Indian matters as to these restricted Indian lands will easily defeat said Acts of Congress and render them absolutely useless in any protection of such Indians or their restricted lands, for it is always the easiest matter possible to procure such Indian deeds by fraudulent methods and sometimes as easy to procure the approval thereof. This and the *Snell* case are convenient examples of such cases and the easy method of thus procuring approvals thereof; and that, too, without the knowledge or consent and against the protest of the Indian grantor, and either with or without a consideration for such deed, as Hannah Canard in paragraph III denies in this case that she ever received the \$500.00 consideration recited on the face of said deed, and it is nowhere shown that she did get it, yet she had to account therefor on said approval on the 17th of June, 1913, if said deed and approval are held valid.

But said paragraph III of said cross-complaint does not by any means contain all the charges of fraud, deception and misrepresentation set up in said cross-complaint to avoid said deed and approval. The charges therein contained are, indeed, the least important of those embraced in said cross-complaint. But the graver charges of fraud contained therein are nowhere mentioned, referred to or considered by said Circuit Court of Appeals in said last decision. Hence, said decision is necessarily erroneous because it failed to reach the merits of this case. In other parts of said cross-complaint

are the charges of fraud and deception and misrepresentation whereby it is shown that Crump, in open violation of his written contract of employment with Hannah then on public record, sold out to Litchfield under a written contract and executed him a quit claim deed for all his rights and interests therein, on May 26, 1913, and doubtless for the \$5,000.00 paid in cash and the two thousand dollar check held by Patterson, and at the same time representing to Hannah that he would pay her \$2,000.00 to be released from said contract and that he could not attend to said suit; the execution of said petition for the approval of said deed dated the same time and signed by Crump with said note on the back thereof addressed to said county judge and asking for such approval, again in open violation of said contract of employment and duties as her counsel; that Hannah was then left practically under the control of defendants in said suit as they then took her on said occasion to Okemah, and being unable to see Judge Smith, again returned for her in about two weeks to again go over before said county judge; at which time said approval was obtained, Hannah was brought into the presence of said judge and given the \$2,000.00 draft through Wallace and said judge was shown the \$2,000.00 check to Crump by Patterson, thus making it appear to said Smith that the whole matter was understood and agreeable both to Hannah and Litchfield who furnished this money as stated by Wallace, when in truth Hannah testified

that she was totally ignorant of any such approval or the nature of said transaction and believed all the while that the \$2,000.00 given her was what Crump had promised her but the same was actually paid by Litchfield. Then came these contracts between Crump and counsel for Litchfield in said suit whereby said suit was to be settled and dismissed with prejudice against Hannah Canard Barnett and the title to said lands was to be quieted in Litchfield and Hannah thereby defeated; and thereafter decrees in both the federal court and the District Court of Creek County to that effect and by reason thereof were made and so entered, all of which are set up and charged as fraudulent in the cross-complaint of these appellants, but nowhere mentioned or considered by said Circuit Court of Appeals in its last decision in this case. In the first decision of said court herein however, such matters were considered by Judge AMIDON and held to be too grave charges to let pass without consideration, and held that if the same were substantiated said approval of June 17, 1913, was a nullity, as is now shown therein in the 259 Fed. 399 and 400, and to which the attention of this court is directed. These decrees of said courts so obtained, appellees refused to recognize or accept, and have repudiated the same in this case from the very beginning and did not rely upon the same on the trial of this case or in said Circuit Court of Appeals. And, of course, not having pleaded the same or relied thereon heretofore, they cannot and

very probably will not now attempt to rely upon the same in this court. But if said decrees were invalid, and they certainly were, because obtained by agreements against public policy and the provisions of said Acts of Congress, and said contract of employment with said Crump, as well as otherwise, and said suit being dismissed with prejudice by agreement against this full-blood Indian as to her restricted lands, then the procurement of said approval by like arrangements and similar methods is, likewise, illegal; for evidently there was a mutual combination and agreement then existing between Crump, Litchfield, Wallace and others co-operating with them, to so obtain said approval by thus inducing Hannah to come before said county judge where she should be paid the \$2,000.00 and Patterson make an exhibition of this \$2,000.00 check to Crump and thereby make it appear to Judge Smith that said cause was being settled by the payment of an additional \$2,000.00 to Hannah and \$2,000.00 more to Crump and thereby to procure his signature to an approval of such deed upon this petition therefor secretly obtained from Hannah by her signature to the jurat thereon, thus making things appear regular on their face whereas they were in truth as irregular as was possible to be. As Hannah had repeatedly refused to sell this allotment of her deceased child, as stated in her cross-complaint, and had brought this suit to recover the same soon after she discovered there was this deed for it, it was evi-

dently known and understood that she would not voluntarily agree to such approval if she knew it was arranged to thus have the same approved. So, an excuse must be presented to her to get her to take \$2,000.00, and to carry this out it was evidently arranged when Crump sold out to Litchfield that Crump was to make these representations to her and offer her the \$2,000.00 to be relieved of his contract whereby said suit would abate and she would not expect the same to be prosecuted, as she evidently did think so as shown by her testimony concerning the same. Smith was likewise to be induced to sign the approval of the deed but evidently had refused to approve it in its original form and consideration. So, the \$2,000.00 additional consideration had to be put up. But this was not paid directly to Hannah by Litchfield, but this draft on the Weleetka bank for \$2,000.00 was thus handed her. If it had been directly paid to her in money by Litchfield, she would have known that it did not come from Crump and maybe thereby discover the inside scheme, or, at least, refuse the money. Such a plan was well calculated not only to deceive and defraud this densely ignorant, illiterate Indian woman but, likewise, Judge Smith then lying there nigh unto death and thus imposed upon by such unnecessary annoyances. Such conduct and performances have every earmark of a fraudulent design on both Hannah and Judge Smith and purposely to obtain said approval of said deed and thereby, in appearance at least,

procure said lands from this unfortunate Indian woman. Hannah went upon the witness stand and told her story about these transactions and what she then was told and understood and supposed was the truth of things. Not a soul but Patterson was produced to testify against her; and he only as to what occurred the few moments she was before Judge Smith, heretofore referred to. But no one denied her testimony about Crump or what he told her about them coming after her to carry her before Judge Smith. Nor were Crump, Skinner, Wallace or McDermott or the witnesses to said deed called by appellees as witnesses to testify against her, or as to what she testified before Judge Smith, or in said conversation with Crump, or the receipt and payment of said \$5,000.00. On the other hand, Turner, Stanford and Smith were called as witnesses on her behalf to testify as to said \$5,000.00 and did so testify, showing that they were equally interested with Crump in the lease he had obtained on the lands from Hannah and of the payment of this \$5,000.00. They also testified they had received \$833.33 each, and that same amount was received by Welch and Jim Turner, also interested therein; and it is shown by the testimony of Sam Turner that Crump told him said \$5,000.00 was paid to him by said Litchfield in said suit or for his interest therein or in said lease thereby obtained. If such conduct and results thus portrayed in the record in this case thus actuated to procure said approval are not fraudulent

and do not show fraud and deception, it would be hard to conceive what circumstances it would otherwise take to establish fraud and deception in the conduct of men. But this particular feature is also more fully discussed in said supplemental brief and will be no further considered here.

SEVENTH AND EIGHTH ASSIGNMENTS.

7. In refusing to hold and find that the defendant W. A. Kunkel was not an innocent purchaser.

8. In refusing to hold and find that the defendant Prairie Oil and Gas Company was not an innocent purchaser.

It is evident from the complaint, and replies herein of the appellees, that they were relying in this case for protection almost exclusively upon their plea of being innocent, or *bona fide*, purchasers of said lands and the lease given and held by them on the lands. But this is an affirmative plea and on them rested the burden of proof, as shown and held in the first decision in this case by the Circuit Court of Appeals and the law generally on that subject. The plea of being an innocent purchaser and thereby shielding themselves in such way, tacitly admits that there was something materially wrong or defective in the lands arising prior to the time they became interested therein. Otherwise, it would not matter, as they would have a perfect title anyway and the doctrine of innocent purchaser would have

no application without such defect of title. Hence, this burden of proof rests upon him who claims to be an innocent, or *bona fide*, purchaser of lands where the title thereto is clouded or involved in questionable conduct. But, in order to be an innocent purchaser, such purchaser must always have and hold the legal title to such lands, as held by this court in *Hawley, et al., v. Dillard*, 178 U. S. 476, 44 L. ed. 761, and other of its decisions there cited, and *Lowe v. Fisher*, 223 U. S. 95, 56 L. ed. 364. Appellees did not have, and do not now have, the legal title to said lands, as the same had not vested in Hannah Canard at the time she executed said deed on March 22, 1909, by reason of section 5 of said Act of Congress of April 26, 1906; and her after-acquired title and property in said lands, she being a full-blood Indian and such lands restricted, would not vest under said deed at any time thereafter. *Starr v. Long Jim; Monson v. Simonson; Franklin v. Lynch, supra*. Before discovering the fraud, or imperfection, of the title to their lands, innocent purchasers to be shielded by that doctrine, must have paid the full consideration therefor, or parted with something of value capable of a money consideration, etc., *Lykins v. McGrath*, 184 U. S. 168, 46 L. ed. at page 487, citing Devlin, Deeds, Sec. 813. Here we contend that these appellees, and particularly, Kunkel, were not *bona fide* purchasers of such lands as, according to his own testimony, the \$550,000.00 paid for said lands, and other lands, was paid to Litchfield by the check

of the Prairie Oil & Gas Company on the 12th day of May, 1914, on the delivery of said oil lease, said Kunkel having on the 6th of May, 1914, taken a deed from said Litchfield and others with special covenants, with an outstanding interest in said lands held by Wallace, Trippett, Sawyer and Hays, as shown in the instrument on pages 151 and 152 of the record and not assigned to the Prairie Oil & Gas Company until the 15th of April, 1916, as shown by the assignment thereof on said page 152. Besides, it was held by this court in *Franklin v. Lynch*, *supra*, and by the federal court in *Laughton v. Nadeau*, 75 Fed. 789, that these Acts of Congress are public notice to all parties dealing with these Indians of the nature and character thereof and the restrictions and prohibitions therein contained, and those dealing with them do so as their risk; and in this *Laughton* case it was held:

“Parties dealing with Indians must take notice of public treaties and Acts of Congress, and do not take lands as *bona fide* purchasers relieved of restrictions on alienations merely because no restrictions appear on the patent. Proceedings void for want of jurisdiction cannot be cured by ratification or waiver.”

In *Wah-hrah-um-pah v. To-wah-e-he*, 188 Pac. 106, the court held:

“(1) It is well settled that a conveyance executed in violation of restrictions is void, and conveys no title to the grantee. The restrictions are a matter of governmental policy, and

therefore no rule of property will avail to defeat them. A general restraint on alienation in the Act of Congress will be construed as extending to devisees by will."

Besides, this contract of employment of said Crump by Hannah was in writing and on the ... day of April, 1913, was duly recorded in the proper office of Creek County, Oklahoma, wherein said lands were situated, and thereby the same was notice of its contents and provisions to said appellees and all other persons; and a copy thereof was attached to the petition in said suit of Hannah to recover said lands filed in the District Court of said Creek County as an exhibit thereto and part thereof, and of which said Litchfield and his counsel therein necessarily had full and complete notice. By this contract said suit was not to be settled or compromised until the title to said lands were quieted in Hannah Canard Barnett, and had to be approved by the County Court of said Okfuskee County before the same could be in any manner disposed of, as therein provided; and until the title thereto was quieted in Hannah, the rights of Crump therein were not to be perfected, and said contract was, by its terms, made binding on the parties thereto, their heirs, assigns etc., as shown from said contract on pages 14, 15 and 16 of the record. Therefore, the assignment thereof to said Litchfield and the quit claim deed therefor of Crump to Litchfield, shown on pages 18, 19 and 20 of the record, and said agreements of

Crump with Litchfield agreeing to dismiss said suit with prejudice, shown in Exhibits Nos. 6 and 7 on pages 21 and 22 of the record, were utterly void; and thereby being of public record in said suit and said contract of employment of public record in said Creek County the same was notice to said appellees and that the actions arising therefrom were therefore void and against public policy.

In *Burck v. Taylor*, 152 U. S. 632, 38 L. ed. 578, in the syllabi thereof, this court held:

“1. As a general rule, a contract made in contravention of a statute is void, and cannot be enforced.

“2. Where in a contract with a state the contractor agreed not to assign the contract in whole or in part without the consent in writing of the state authorities, such agreement is binding not only upon the parties, but upon all others who seek to acquire rights in it.

“3. When rights arising out of contract are coupled with obligations to be performed by the contractor, and involve a relation of personal confidence, the contract cannot be assigned by him without the consent of the other party.

“4. When an executory contract is transferred to a third party who is accepted by the promisor in lieu of the original contractor, such third party enters upon the performance of the contract free from any disposition of the profits made by the original contract or before the substitution.

“5. Constructive notice of a contract cannot be implied from the fact of its record in the

office of the clerk of the county, where there is no statute providing for such record.”

(This is the case cited in discussing the first assignment as to the admission in evidence of this copy of a copy of said alleged order, and where it was shown there was no law, state or federal, requiring such Indian approvals to be recorded anywhere. Hence, this decision and especially point 5 thereof is decisive of that question).

The leading decision of this court on the doctrine of innocent purchaser seems to be *Boone v. Chiles*, 10 Pet. 177, 211, 212, 9 L. ed. 388, 400 and 401, cited in said *Hawley v. Dillard* case and also in *Wright-Blodgett Co. v. United States*, 236 U. S. 395, 59 L. ed. 637, cited in the first opinion in this case by the Circuit Court of Appeals, and in which opinion, at page 640 of said 59th L. ed., it is quoted therefrom, as follows :

“In setting it up by plea or answer, it must state the deed of purchase, the date, parties, and contents briefly; that the vendor was seised in fee, and in possession; the consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous to and down to the time of paying the money, and the delivery of the deed; and if notice is specially charged, the denial must be of all circumstances referred to, from which notice can be inferred; and the answer or plea show how the grantor acquired title. * * * *The title purchased must be apparently perfect, good*

*at law, a vested estate in fee simple. * * * It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity. * * ** Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchaser without notice; the case stated must be made out; evidence will not be permitted to be given of any other matter not set out.” (Italics are ours.)

This excerpt and the decisions there cited in this *Wright-Blodgett* case practically settled, *first*, that the plea of being an innocent, or *bona fide*, purchaser of appellees in this case was not sufficient either in form or in substance to comply with the requirements of such a plea; *second*, that the objections thereto of appellants for such reasons ought to have been sustained by the trial court and its actions in overruling the same was error; and, *third*, that said appellees are not innocent purchasers at all as a matter of both law and fact, *first*, because they do not have or hold the legal title to said lands which they must have to be an innocent purchaser, *Hawley v. Dillard, supra*; *second*, they did not properly plead or show facts sufficient to entitle them in said cause to such relief, as shown by the above excerpt; *third*, because these are restricted lands in the hands of a restricted Indian and protected by said Acts of Congress and a violation thereof renders the deed void and all must take notice thereof,

Franklin v. Lynch; Laughton v. Nadau, supra; fourth, because, by the recordation of said contract of employment of said Crump, and the attachment of a copy thereof to the pleadings in said cause in said District Court, and therefore found in the chain of title in this case, was notice to appellees that said contract was not assignable and said suit could not be settled or dismissed as so undertaken in said suit, and that said Litchfield took said matters not only with public but with actual notice of the matters thus prohibited; and, *fifth*, said appellees, through said deed of March 22, 1909, obtained, at best, only the equitable title to said lands, with the legal title thereto outstanding in the appellant, Hannah Canard Barnett, therefore their plea of *bona fide* purchaser has no application, force or effect in this case.

It, therefore, follows that the determination of whether said Kunkel and said Prairie Oil & Gas Company were, or were not, *bona fide*, or innocent purchasers of said lands, was a material and indispensable feature in this case, and should have been decided and passed upon by said Circuit Court of Appeals.

As the opinion of the Supreme Court of Oklahoma in the *Snell* case is not published, we attach a copy thereof to this brief for the convenience of the court, as appendix "A."

We, therefore, conclude this brief by maintaining that said Circuit Court of Appeals erred in its last decision rendered herein not only as to the matters it did decide shown in the opinion thereof, but, likewise, in not deciding the material parts of the case and, particularly, the fraud charged in the cross-complaint of appellants, omitted from such decision but involved in this case under the issues thereof and which were before said Circuit Court of Appeals; and ask that said decision be reversed on behalf of the appellants in this case.

Respectfully submitted,

LEWIS C. LAWSON,
FRANCIS STEWART,
MALCOLM E. ROSSER,
Counsel for Appellants.

October 8, 1923.

SUPPLEMENTAL BRIEF OF APPELLANTS.

Statement of the Case.

This was the second appeal to the Circuit Court of Appeals, the decision in the first being found in the 259th Federal, at page 394. After the case was remanded, the appellants, by permission of court, filed their amended answer and cross petition eliminating some matters and including others. As the parties and counsel in both appeals are the same, and brought before the same court, we deem it unnecessary to go more fully into all the details of this case or the authorities governing the same in this brief, but kindly ask this court to read and consider herewith our principal brief, pages 1 to 124 inclusive.

The case was brought before the Court of Appeals from a decree on a motion for judgment on the pleadings, and, the merits of the case were then gone into by the court only so far as to determine the rights of the parties on said motion; and the cross petition was held to state a cause of action and entitled to be heard and decided on its merits. That trial came on to be heard on the 17th day of January, 1921, and being heard by the court, it was decided adversely to the appellants and in favor of said appellees, as may be seen on page 68 of the record. From this decision appellants have taken the second appeal and have

assigned eighteen distinct grounds of error, as may be seen on pages 166, 167 and 163 of the record.

This suit involves the allotment of Mahaley Watson, who was the illegitimate child of the appellant, Hannah Canard Barnett. Mahaley Watson died a mere infant in October or November, 1908, and left her said mother as her sole and only heir at law. The lands comprise 160 acres situated in Creek County, Oklahoma, and seem to have been arbitrarily selected in November, 1907, for which a certificate was issued in July, 1908. But the patents therefor were not issued until after the death of the allottee, and bear date of the 10th day of March, 1909, were approved by the Secretary of the Interior on March 24, 1909, and were recorded in the office of the Commission of the Five Civilized Tribes on March 27, 1909. At the time of her death Mahaley Watson lived and resided and had her place of abode in Okfuskee County, Oklahoma; her mother, Hannah Canard Barnett, as well as said Mahaley, were Creek Indians and members of said tribe and said mother was enrolled upon the approved rolls of said tribe as a full-blood Creek Indian, all of which is shown in an agreed statement of facts on pages 136 and 137 of the record.

This controversy arose over a purported deed for said land, purporting to have been made by Hannah Canard Barnett in the name of Hannah Canard, to one B. O. Sims, and dated the 22nd of March, 1909, and purporting to be a warranty deed for said

land, as shown on page 139 of the record. On page 138 is a purported order of approval of said deed, purporting to have been made by the County Court of Hughes County, Oklahoma, on the same date, to-wit, March 22, 1909. But as it is shown by said agreed statement of facts that Mahaley Watson was living and had her place of abode in said Okfuskee County at the time of her death, this alleged or pretended approval of said County Court of said Hughes County is thereby eliminated and shown to be absolutely null and void. *Bartlett v. Okla Oil Company*, 236 Fed. 488, wherein a similar full-blood deed was approved by said County Court, where the deceased allottee lived and died in McIntosh County, and was held to be absolutely null and void and not susceptible of ratification or waiver; and that the grantee therein acquired no rights whatever thereby or thereunder. Since that decision, the Supreme Court of the United States, in *Harris v. Bell*, 254 U. S. 100, 103, 65 L. ed. 159, has specifically held, in substance, that the County Court of the county wherein the deceased allottee lived and resided was the court that had jurisdiction to approve the deed of the full-blood heirs of such deceased allottee; and the same was also referred to in *Parker v. Richard*, 250 U. S. 235, 63 L. ed. 954. So we will give no further consideration to said approval of said County Court of Hughes County in the subsequent part of this brief, but treat it as a nullity, as so held in the first decision above mentioned.

It is claimed by said appellant in her amended cross petition, in effect, that she was not aware at that time that she had made a deed for this Mabaley Watson allotment, but, together with her mother, had sold and supposed she was conveying the allotment of her deceased father. Hully Canard; but this deed in controversy seems to have been in some way also procured, and was filed of record in the office of the Register of Deeds of Creek County on the 26th of March, 1909, and recorded in book 31, at page 104, as shown on page 140 of the record. Afterwards, said Sims, on the 25th of October, 1909, conveyed said lands to Clyde Brannan by warranty deed, recorded in said office on March 22nd, 1912, and thereafter by various mesne conveyances, said appellees acquired claims to said land, as shown on the face of their bill, many of which as there shown were quit claim deeds. On May 6, 1914, Litchfield, Booth and Cheney and wives attempted to convey said lands to said Kunkle by special warranty deed, which was recorded in said office May 13, 1914, and recorded in book 99, at page 454. But on May 12, 1914, said Kunkle took another deed for said land from said grantees, as shown on pages 30 and 31 of the record, whereby they warrant the title thereto, but said deed was not recorded in said office until January 22, 1915, as shown on page 32 of the record. On the 12th day of May, 1914, said Kunkle gave said Prairie Oil and Gas Company an oil and gas lease on said land, as shown on pages 32, 33 and 34 of the record, and on

the 15th of April, 1916, assigned and set over to said Prairie Oil and Gas Company all his rights under a special contract with said Litchfield, and others in and to said lands and the oil and gas rights therein, as shown by said agreement and assignment on pages 151 and 152 of the record.

After the appellants discovered that said Sims had procured said deed for said lands, dated March 22, 1909, they decided to bring an action to recover the same, and on the 27th day of March, 1913, made and entered into a written contract with one George C. Crump to bring suit and to recover said land, which said contract is shown on pages 14, 15 and 16 of the record; and at the same time, in consideration of such employment, gave said Crump an oil and gas lease for 99 years on eighty acres of said land, as shown on pages 10 and 11 of the record, in paragraph 3 of said contract it is expressly provided:

“That said party of the first part hereby employs the service of said Geo. C. Crump as attorney for the purpose of bringing immediate suit in a proper court and prosecuting the same to the final determination with all due diligence, for the purpose of quieting the fee simple title to all of the property described in section ‘1,’ inclusive,” etc.;

and in paragraph four thereof it also expressly provides:

“That no settlement, adjustment, dismissal or compromise of any kind of said suit shall be made by or be binding upon either of the parties

hereto, or entered in any court, except with the express approval of the County Court of Okfuskee County, Oklahoma, and this clause is a material part of the consideration of this contract."

Paragraph 8 of said contract provides:

"All the terms, conditions, stipulations and agreements, embodied in this contract and agreement, shall extend to and be binding upon the heirs, executors, administrators, and assigns, of all the parties hereto, equally as upon the parties themselves."

Said 99-year lease, among other things, provides that:

"The further consideration above mentioned or the employment and services of said Geo. C. Crump, as per the terms and conditions of the written contract of said parties hereto of this date above referred to, which contract is herewith made a part hereof." * * *

"In consideration of the premises the said party of the second part covenants and agrees:

"That there shall be no assignment of this contract, or any right thereunder, until the title to the allotment of Mahaley Watson, deceased, shall have been quieted as per the term and conditions of the written contract hereinabove referred to;"

and that;

"All covenants and agreements herein set forth between the parties hereto, shall extend to their heirs, executors, administrators, successors or assigns."

It is also provided in said contract "That a copy of this contract shall be filed with the court in which the suit hereinabove referred to is filed."

Four days after making said contract, to-wit, on the 31st day of March, 1913, said Crump and J. L. Skinner, as attorneys for said appellant, Hannah Canard Barnett, brought a suit or action in the District Court of Creek County against said Sims, Litchfield, Brannan and others to recover said land, under said contract of employment, a certified copy of the petition therein is shown on pages 12, 13 and 14 of the record, to which a copy of said contract was attached and made part thereof as "Exhibit A;" and on May 2, 1913, said Sims appeared in said suit and filed his disclaimer and disclaimed any title or interest in the real estate mentioned in said petition, as is shown on page 17 of the record.

Without the knowledge or consent and without the approval of the County Court of said Okfuskee County, and contrary to the terms and conditions of said contract and lease, said Crump, on the 26th day of May, 1913, made and entered into a written contract with said Litchfield, wherein said 99-year lease is recited and where it is specifically pointed out that said lease was so recorded on the 2nd day of April, 1913, in book 89, at page 244, in which contract said Crump undertook to sell, grant, convey, transfer and assign to said Litchfield, "all of my right, title and interest in and to the above mentioned

and described oil and gas mining lease and in and to the property rights or property interests, powers and possessions of every kind therein conveyed, all and singular, subject, however, to the limitation, restrictions and liability therein imposed, insofar as the same affects the northeast quarter of the northeast quarter and northeast quarter of the northwest quarter" of said lands. On the same day and date said Crump undertook to remise, release, convey and quit claim to said Litchfield and his heirs and assigns forever, "all his right, title, interest, estate, claim and demand, both at law and equity, or in and to all" of said lands embraced in said oil lease which said contract and deed to said Litchfield are shown on pages 18, 19 and 20 of the record.

That without the knowledge or consent of the appellants and without the approval of the County Court of Okfuskee County, and in direct violation of the terms and conditions of said contract and lease so made with the appellants by said Crump, said Crump and Skinner, acting as attorneys for said plaintiff, and Sherman, Veasey & O'Meara, as counsel for said Litchfield, on the . . . day of June, 1913, undertook to enter into a written stipulation whereby it was agreed that a decree should be entered in said action in the federal court to which it had been removed, dismissing the plaintiff's petition with prejudice, and quieting the title to such land in the defendant, R. S. Litchfield; that a similar decree should be made and entered in said cause in the Dis-

trict Court of Creek County, quieting the title in said Litchfield, etc., as shown on page 22 of the record, and a similar stipulation is to be found on page 21 of the record, said stipulation to be filed in said cause in the District Court of Creek County and also in the federal court, where said cause was removed after being brought. In pursuance of said stipulation a journal entry was made by said District Court of Creek County on the 11th day of July, 1913, whereby said lands were decreed to said Litchfield and his title thereto quieted against said plaintiff, who was thereby enjoined and restrained from setting up any further title to said land, etc., as shown on pages 24 and 25 of the record; and a similar journal entry was made on the 3rd day of July, 1913, by said federal court to which said cause had been removed.

But as the appellees repudiated these agreed stipulations and these journal entries of said courts made thereon and refuse to claim anything thereunder in the case at bar, their legal force and effect will be given no further consideration in this brief by the appellants, other than to refer to them hereafter as a part of the scheme thus resorted to to defeat the rights and interests of Hannah Canard Barnett in said lands and to attempt to procure another approval of said deed to said Sims.

On page 141 and thereafter appears what purports to be an approval of said deed to said Sims

by the County Court of Okfuskee County. The court will observe that this oil lease and contract of employment of said Crump were made on March 22, 1913; that on March 31, 1913, this action was brought in the District Court of Creek County to recover said lands and then removed to the federal court; and that thereafter on May 26, 1913, Crump and Litchfield entered into this contract and Crump executed said deed to said Litchfield for all his rights and interests in said lands. These events happened in rapid succession and were in open violation of the terms and conditions of the lease and contract by which said Crump was thus employed, and by reason of which the title to said lands was to be quieted in Hannah Canard Barnett before in fact any rights accrued thereunder to said Crump which he could sell or convey. The court will further observe that all of these things took place before this pretended approval of June 17, 1913; and the dealings between said Crump and Litchfield had culminated in said contract and deed on the 26th day of May, 1913, about three weeks before this pretended approval by the County Court of Okfuskee County. But it is charged in the cross complaint of appellants that said Crump, about the 1st of June, 1913, informed the appellant, Hannah Canard Barnett, that, in substance, there was a possible chance to win the suit; that it might take a long time and he could not attend to it at that time, and that he would give her

\$2,000.00 to be relieved from his contract of employment.

Hannah Canard Barnett and Wallace made one trip that same day to Okemah to see Judge Smith, but he was so ill they were unable to see him, and went back again on the 17th of June, 1913, at which time she was admitted into the presence of Judge Smith at his home where she received a check for \$2,000, after the same had been handed to Judge Smith by Wallace; but in said conversation with said Crump as to being so released from the contract, and at no time while before Judge Smith on the 17th of June, 1913, or any other time or place, was there anything whatever said to her or in her presence, of which she had any knowledge, about Judge Smith approving said deed to Sims. Crump was not present on that occasion, but Patterson testified that he also held a check for Crump for \$2,000.00, and these checks, one held by Wallace for Hannah and the other by Patterson for Crump, were there shown and exhibited to Judge Smith.

On pages 152 and 153 appears a petition for the approval of said deed, signed by Crump and Skinner, attorneys for petitioner, bearing date of May 26, 1913, and purporting to have been filed with the clerk of the County Court of Okfuskee County, on June 17, 1913. On page 154 of the record it will appear that on said petition was the following endorsement: "*I examined the facts herein and ask that the deed be*

approved. G. C. Crump. May 26, 1913." This is the same day Crump sold out to Litchfield and made said contract and deed with him for his interests in said land. This petition is also signed by Crump & Skinner, who also signed a petition in the action brought in Creek County, less than two months before said date. It thus appears authentically that Crump was very active on the 26th of May, 1913, first, doubtless in closing the deal with Litchfield and then manipulating matters so as to procure an approval of said deed to Sims by the County Court of Okfuskee County, and prepared this petition for such purposes, all without the knowledge or consent of his client, Hannah Canard Barnett; for, while said petition purports on its face to have been sworn to by the appellants, no one has testified in this case that they did swear to it. But on the contrary appellants set out in their cross complaint that while they have no recollection of any such petition they may have been induced to sign it without knowing its nature and character and did not know that such proceedings were for the purpose of having said deed so approved.

It is also alleged in the cross complaint of appellants that said Hannah Canard Barnett cannot read, write or understand the English language and was unaccustomed to doing business, and had little knowledge of the value of property, and in all of these matters she was acting under the advice and influence of her counsel. She so testifies on the trial of

this case; and of all the people of her acquaintance, not one was produced to contradict her testimony on that point. She also testified that she could not understand a conversation in English; that once in a while she could catch a word, but not enough to understand the conversation; that she had gone to school some, but the English language was hard for her and she could not learn. She testifies that about June first she and Crump were together at Weleetka where this conversation occurred, and where he offered her the \$2,000.00 to be released, at which time he was advising her about the case—not to settle it, not to compromise it, but simply to release him from his contract of employment, for which he would pay her \$2,000.00 to be given to her that day. But this petition and the endorsement thereon dated May 26, 1913, show conclusively on the face thereof that he was then paving the way to get her before the County Court of Okfuskee County—not to get the \$2,000.00 he had thus promised her to be relieved from the contract—but to get said deed in some form or manner apparently, at least, approved by said County Court.

It is in substance alleged in their cross complaint that on this memorable occasion a check for \$2,000.00 to Hannah was presented to Judge Smith by Wallace and another for \$2,000.00 to Crump by Patterson, was to make it appear to Judge Smith that said matters were being settled and that Hannah and Crump were sharing equally therein and

that, thereby, said Judge Smith was deceived and defrauded in such matters and would not have signed said order had he have known the true facts in the case. Now, it is shown by the testimony of Patterson that such exhibits were actually made to Judge Smith at the time of this alleged approval on the 17th of June, 1913. It is true that Patterson tries to make it appear in his testimony that such matters were explained to Hannah by Judge Smith—that she understood them. But when asked whether he could understand Creek he said “little bit;” and when asked what Hannah said in response to these matters, he answered that she said “Uh huh,” as shown on page 122 of the record. But on page 123 he admits he was the attorney for Litchfield and had talked to him over the phone.

On page 118 Wallace is called as a witness and testifies to the draft delivered to Hannah and has to admit that the money came from R. S. Litchfield and that he was there representing him. Wallace was also present when Crump had this talk with Hannah, as shown by her testimony, for she says they took her over to Okemah that same day; and when asked who took them, she answered: “Wallace.” Wallace was also present before Judge Smith on June 17th, 1913, and handed him the \$2,000.00 check for Hannah, which he says came from Litchfield. By turning to page 152 of the record it will be seen that Wallace had an interest in such matters as so charged in the cross complaint of appellants.

So, the record discloses that Crump, Wallace, Litchfield and their attorney, Patterson, were thus actively engaged in trying to get an approval of said deed from the County Court of Okfuskee County, and at the same time Crump was representing to his client, Hannah Canard Barnett, that "there was a possible chance to get the land back to me but it required too much time and trouble and that he could not get into it and for that reason he wanted me to release him from the contract and that he would pay me if I would release him from the contract;" and when asked how much he promised to pay her, she answered: "He told me he would pay me two thousand dollars" (see page 109). She was then asked: "Did he say anything about the County Court or county judge"? and answered: "Why, he did not say anything about the county judge at that time. Only said if I would release him from the contract he would pay me. He said he could not do anything for me regarding the land just at that time and so I told him if he could not do anything I could not do anything and that I was looking to him to work for me and so I would release him if he wanted me to release him" (same page). She then testifies that on that same day they took her to Okemah, which is fourteen miles from Weleetka, where they then were; that Wallace took her, but Crump went to Holdenville.

The testimony of Stanford, Turner and Smith shows that Crump received \$5,000.00 from Litchfield

to settle these matters; that the same was sent by Crump to Skinner and that Skinner paid Stanford, Turner and others who were in with Crump in said matters the sum of \$833.33 each as their part of the \$5,000.00 thus paid. Patterson testifies that he held a check to Crump for \$2,000.00 which he exhibited to Judge Smith. This makes \$7,000.00 which Crump seems to have received in settlement of said matter. But Hannah Canard Barnett testifies that she had no knowledge of such money ever having been paid at any time. So the settlement of said matters and the payment of said money was kept a secret from Hannah Canard Barnett, who, all this time, was being represented by George C. Crump, as her attorney in all said matters; and at the same time he was representing to her that he could not do anything for her at that time and that it would take too much time and trouble and that he would pay her \$2,000.00 to be released from the contract, to which she assented, as she says she told him if he could not do anything for her she could not. During all this time she testifies in substance that nothing was said to her by Crump or anyone about settling said suit or having this deed to Sims approved by the County Court of Okfuskee County. It is true that at the close of her testimony she, in response to questions, answered as follows:

Q. What did you think the \$2,000.00 he said he would pay you was for?

A. I was told he was going to pay me \$2,000.00 as

a consideration for being released from the contract.

Q. Then were you to keep the \$2,000.00 and the land too?

A. Well, I just supposed he was paying me \$2,000.00 for getting his release from the contract and that went on that lawsuit.

Q. Didn't you understand if you took the \$2,000.00 you would let the land go?

A. Why, I just took it for granted this lawsuit was being stopped.

Q. You mean the lawsuit was being settled?

A. Yes, sir.

Q. And that you would take the \$2,000.00 in money to settle a lawsuit; that right?

A. I did not know it was being a compromise made, but just told me he was paying me \$2,000.00.

The Court: I will find from this evidence she took the two thousand dollars and that was a final settlement and intended that—understood that. I don't think the idea of anybody giving her two thousand dollars to be released from the contract—that is ridiculous. The only thing in this case is whether her attorney, being on both sides, whether that would invalidate it.

Q. Tucker Barnett, your husband, was with you every time you went to see Judge Smith?

A. Yes, sir.

Q. He understand and talks English?

A. Yes, sir.

Q. Did you know and didn't you understand Judge Smith to say that this two thousand dollars would be all you would get out of the Mahaley

Watson land and that would end it and you would have no more right to it?

A. Yes, sir.

Witness dismissed.

But from these answers it is apparent that Hannah Canard Barnett supposed that when George C. Crump should pay her the \$2,000.00 to be released from his contract of employment that it was to go on the lawsuit, and that thereby the lawsuit would be stopped, as she would have no attorney to prosecute the same and she would be relieved from said contract and the 99-year lease she had made to him; and it is just as apparent that she did not then understand that a compromise was being made, for she so testifies. The last question is long and complicated and doubtless was misunderstood by her, as it is shown that she is illiterate, without any education and unable to understand matters of business or complicated questions. Her whole testimony should be considered together; and from it it is perfectly apparent that she knew nothing about that day's business before Judge Smith on the 17th of June, 1913, but went there simply for the purpose of getting this \$2,000.00 from George C. Crump as a consideration for releasing him from said contract of employment. Her testimony in this case stands wholly unimpeached by any other witness except what was said by Patterson, which is very meager; and when it is taken into consideration that he could not understand the Creek language only "*little bit*" and was at-

torney for Litchfield, and had to admit her answers before Judge Smith were simply "Uh huh," his testimony has but little weight and is of practically no importance. It is remarkable, indeed, to say the least that if her story is not true, but was false, that George C. Crump and Wallace were not called as witnesses by the appellees to disprove the same. The record shows that Wallace was on the stand and therefore present in the court on the trial, and her testimony shows that Wallace was present on the day this conversation occurred with Crump and took her to Okemah that same day. He should, therefore, have known something about what occurred at Weleetka on that occasion and could have testified to it. But as to that both he and Crump are as silent as the grave, and the testimony of Hannah Canard Barnett pertaining thereto stands out in this record wholly uncontradicted and must be accepted as the truth in such matter. But we will refer to these matters further on in this brief.

ARGUMENT OF COUNSEL FOR APPELLANTS.

In presenting this case the argument, decisions and authorities will necessarily have to be to some extent repeated, but we will try to eliminate as much of that as possible, and, without going into details, we give a general statement of our theory in this case.

As stated in the previous part of this brief, the lands involved in this suit were the allotment of Mahaley Watson, comprising 160 acres, situated in Creek County, Oklahoma. They seem to have been arbitrarily allotted to her in November, 1907, and a certificate therefor was granted in July, 1908. But the patents therefor were not issued until long after the death of Mahaley Watson, and are dated the 10th day of March, 1909; were approved by the Secretary of the Interior on March 24th, 1909, and were recorded in the office of the Commissioner to the Five Civilized Tribes on March 27, 1909. Mahaley Watson was the illegitimate child of the appellant, Hannah Canard Barnett, and died in infancy in the month of October or November, 1908, and left its said mother as its sole and only heir at law, who thereby inherited said land. Both said child and mother were Creek Indians and duly enrolled upon the approved rolls, the mother being so enrolled as a full-blood Creek. Mahaley Watson, being a mere infant at the time of her death, took said lands under the provision of the Act of Congress, approved April 26, 1906, and was governed by said act and by another Act of Congress, approved May 27, 1908, and other Acts of Congress mentioned in the cross complaint of appellants. The said Hannah Canard Barnett, being a full-blood Creek Indian and so enrolled, said lands in her hands were restricted, and their alienation forbidden and prohibited, except as made and provided in section 22 of said Act of 1906, and section 9 of said Act of

1908, and even then as modified and restricted in said sections and in sections 4 and 5 of said Act of 1908, and section 5 of said Act of 1906. Therefore, a deed of Hannah Canard Barnett for said land to be valid and pass the title thereto, it was necessary, we think, for her to have first acquired the fee simple title to said lands and then her deed therefor to be approved by the Secretary of the Interior, as required in section 22, of said Act of 1906, or by the County Court of Okfuskee County, as required by section 9, of said Act of 1908.

On page 139 of the record there appears an instrument purporting to be a general warranty deed for said land to B. O. Sims by said Hannah Canard Barnett, in the name of Hannah Canard, dated March 22, 1909, and recorded March 26, 1909, as shown on page 140, and purporting to have been approved by the County Court of Hughes County on March 22, 1909, as shown on page 138. On pages 154, 155 and 156, and thereafter, another instrument appears purporting to be an approval of said deed on the 17th of June, 1913, by the County Court of Okfuskee County. But it is our contention that both said deed and each of said alleged approvals are absolutely null and void and conveyed no right, title or estate whatever in or to said lands to said Sims or to anyone else, upon the following grounds and for the following reasons:

1st. Because said Mahaley Watson, having died in infancy, illegitimate, and Hannah Canard Barnett

being its mother, a full-blood Creek Indian and so enrolled, and its sole heir at law, their right to said allotment and the allotment itself originated under, and was particularly governed by, said Act of Congress approved April 26, 1906, and particularly section 5 thereof, and the alienation thereof was restricted thereby and governed alone by section 22, thereof, and section 9, of said Act of Congress, approved May 27, 1908. *Tiger v. West. Invest. Co.*, 221 U. S. 286, 55 L. ed. 738; *Parker v. Richard*, 63 Law. ed. 954; *Brader v. James*, 246 U. S. 88, 62 L. ed. 591; *Tally v. Burgess*, 246 U. S. 184, 62 L. ed. 600; *Harris v. Bell*, 254 U. S. 100, 65 L. ed.

2nd. Because said lands having arisen under and being governed by said Act of Congress approved April 26, 1906, and by said Act of May 27, 1908, any alienation thereof had to be strictly in accordance with said acts and said lands themselves had also to conform thereto in all particulars, before the legal title thereto or any part thereof were alienable at all, and had to come strictly within the express provisions of section 5 thereof, which operates as a restriction thereon prior to the fulfillment of its conditions and express requirements which, in part, are as follows:

“And all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner of the Five Civilized Tribes, and when so recorded shall convey legal title and

shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same."

And in *United States v. Lane*, 228 U. S. 6-13, 57 L. ed. 712, the Supreme Court of the United States held:

"Proper regard must also be had for the fact that the Act of April 26, 1906, (34 Stat. at L. 137, Chap. 1876) section 5, expressly contemplates that the title should not pass until the patent was recorded in the office of the Commission to the Five Civilized Tribes."

Here it will be noticed that the court did not say "legal title," but "that the *title* should not pass until," etc., thus indicating that no title at all to such lands should pass until such patents are thus recorded. That the *legal* title to such lands did not pass under said deed to Sims on the 22nd of March, 1909, is too evident for dispute, for here is the express provision of the express statute directly applicable to such lands which expressly forbids and prohibits it; and here is a decision thereon so construing this section and the force of such above provision. Hence, no legal title, at least, and perhaps no title at all, was thus conveyed by said deed when executed; and none could be conveyed afterwards, for after-acquired property of an Indian does not pass under prior deeds for restricted lands. *Bartlett v. Okla Oil Co.*, 236 Fed. 488; *Starr v. Long Jim*, 227 U. S. 613, 57 L. ed. 670; *Monson v. Simonson*, 231 U. S. 341, 58 L. ed. 260; *Franklin v. Lynch*, 233 U. S.

269, 58 L. ed. 954, and *Mullen v. Pickens*, 250 U. S. 590, 63 L. ed. 1158. Hence, had said deed been legally approved by said County Court of Okfuskee County it would not have conveyed the legal title to said lands to said Sims or any one else, but left such legal title still vested in Hannah Canard Barnett where it is to this day. Hence, the doctrine of innocent purchaser would not have, and could not have any application in this case, for the innocent purchaser must always have the legal title before that doctrine applies anywhere or at any time. *Hawley v. Dillard*, 178 U. S. 476, 44 L. ed. 1157, and cases therein cited; and in *Lowe v. Fisher*, 233 U. S. 95, 56 L. ed. at page 370, this *Hawley* case is cited, and it is also held that the powers of the Secretary over the allotment of such lands is similar to the powers exercised by the Land Department, etc. Hence, appellees are not and never can be, innocent purchasers of the lands involved herein, but must stand on the plain law that governs the case.

3rd. Because said deed to said Sims, dated the 22nd of March, 1909, purports to be a general warranty deed for both the legal and equitable title to said lands, and is, therefore, absolutely null and void under said Acts of Congress, and particularly under section 5 of said Act of April 26, 1906, and section 5, of said Act of May 27, 1908, which latter section, in part, provides:

“That any attempted alienation or encumbrance by deed, mortgage, etc., made before or

after the approval of the act, which affects the title of lands allotted to allottees of the Five Civilized Tribes prior to the removal of restrictions therefrom, and, etc., * * * shall be absolutely null and void."

The relevant part of section 5, of said Act of April 26, 1906, is given above; and whereby and by such decision of the Supreme Court it is shown that the legal title to such lands could not possibly pass, on said date, because the same was not then held or owned by said Hannah Canard Barnett, and, of course, could not then be conveyed by her under said deed, and its subsequent approval could not operate to include it as after-acquired property. But here is a bold attempt to alienate both the legal and equitable title to said lands while the same were restricted, and before such legal title had ever passed from the government or was then owned, or could be conveyed under any law then in existence. Hence, the deed is taken in the very teeth of sections 5, of both acts, and by the latter section the same is decreed by the act itself as being "*absolutely null and void.*" Hence, the deed was not susceptible in law of being legally approved, for there was nothing on which such approval could operate, consequently both attempted approvals were as null and void as the deed itself. *Bartlett v. Okla Oil Co.*, 236 Fed. 488, wherein it was held by this court that the whole proceedings were absolutely void, not susceptible of ratification or

waiver, and that the grantee obtained nothing whatever thereunder.

Nor is this the only ground for this contention, for it is our contention that the deed to Sims is utterly void, not only as to the legal title to said lands for the reasons above given, but likewise as to the equitable title as well, and the whole interest of Hannah Canard Barnett in the lands at the time of making such deed, because the deed thus attempted to be made was a fee simple deed with a general warranty for the whole fee simple estate therein, which at that time she did not have and could not convey because of said Acts of Congress. The deed itself is the only and conclusive evidence of the contract then made between Sims and Hannah, and cannot be varied by verbal testimony. If it is illegal when made because violative of these acts, it is forever illegal, for there is no provision in any of said acts for curing an illegal conveyance of such restricted lands, and Congress only—not the courts—has plenary powers over such Indian matters.

But even Congress could not cure this defect in this title or make said deed operate so as to divest Hannah Canard Barnett of her vested rights to said lands. *Choate v. Trapp*, 224 U. S. 665, 56 L. ed. 941. Nor is it in the power of Congress to take lands or vested rights therein from one person and give them to another. *Felix v. Patrick*, 145 U. S. 317, 36 L. ed., at page 725, where it is said: "In no possible view of

legislative authority can it be assumed that an Act of Congress can declare the lands to which one party is by law entitled, shall belong to another," and in *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, it was held that Congress could not by a subsequent act invalidate a valid contract of the Indian and defeat his contracting party; and in *Stephens v. Smith*, 77 U. S. 327, 10 Wall. 321, 19 L. ed. 933, it was held by the Supreme Court that an Act of Congress passed after the execution of an illegal deed of an Indian for his restricted lands, whereby such restrictions were removed, would not relate back and cure or perfect such illegal deed, and thereby divest the allottee of her legal rights therein.

If Congress could not divest Hannah Canard Barnett of her legal rights to said lands by subsequent acts, then could the County Court by such approval accomplish such results? In *Pickering v. Lomax*, 145 U. S. 310, 36 L. ed. 716, it was held that such approvals related back to the date of the deed by reason of the doctrine of relation, and made it perfect as of that date. But in *Midland Oil Co. v. Turner*, 179 Fed. 77, it was held in substance that this federal agency could not add anything to or take from the deed, but could only approve or disapprove the instrument; and in this case and *Wood v. Jennings*, 192 Fed. . . ., it is held that the acts of the federal agency may be entirely nullified by a decree of court if unfounded under the law. So, we find that outside of giving sanction to such a deed, the approval

adds nothing to it nor takes anything from it, but leaves it to the courts to deal with under the law as it existed at the time it was made, and the courts are confined to the evidence in such cases the same as in all other cases. The deed, as we have said, is the only evidence admissible or that the court can judicially know anything about the transaction, and if the deed shows an illegal or void transaction, the courts cannot enforce it, and will not do so.

It is generally provided by state statutes that where one makes a general warranty deed for lands which he does not own at the time, or having less than he undertakes to convey, that his after-acquired rights therein or whatever interest he does have will pass under his warranty deed, and he be estopped from claiming the same. This was the plea set up in *Franklin v. Lynch*, above cited, and which involved chapter 27, of Arkansas, adopted by Congress Feb. 19, 1903, and contains such provisions; so in *Monson v. Simonson*, *supra*. But this court held such a doctrine—although in said statute—did not apply to the restricted lands of an Indian. Section 1160, of the Revised Laws of Oklahoma, 1910, embraces a similar provision and was intended to so operate as to include in such a deed not only what the grantor then had, but what he might afterwards acquire of the lands described in such deed. But that is a state statute and has no application whatever to the restricted lands of allottees of the Five Civilized Tribes, as so held by the Supreme Court. This leaves such an

Indian's deed for his restricted lands to be construed and enforced according to its own terms and provisions, and if incapable of being enforced in strict accordance with these Acts of Congress, it cannot be enforced at all, but is a complete nullity. Such an Indian, being *non sui juris*, can do nothing, and make no contract or agreement, respecting his restricted lands, save and except what is first permitted by some Act of Congress, and even then, he must do it in the way and manner prescribed by such act where this act so prescribes. *Stephens v. Smith*, 19 L. ed. 933. Hence, if such an Indian undertakes to convey a greater interest in such lands than he has at the time of conveyance, even though he may have a lesser interest therein than is attempted to be conveyed by the deed, such deed is absolutely null and void under these Acts of Congress, because taken in violation of such acts; and if they violate the acts in one particular they are illegal and non-enforceable in courts of justice in every other particular, for the deed itself is the only evidence of what was thus attempted to be sold and bought, and courts can no more so contract the terms and provisions of such a deed to make it convey a lesser interest or estate than that described in the deed than they can enlarge the deed so as to embrace or convey after-acquired property, which can never be done at all according to *Franklin v. Lynch, et al.*, above cited. The legal principle is the same in one case as in the other when involving a restricted Indian and his restricted lands,

even though it would not be so as to a person *sui juris*.

To undertake to hold that such a deed of such an Indian for such lands conveys a lesser estate or some other title than that attempted to be conveyed by the deed itself, is simply rendering a judgment without a particle of evidence to support it even in the slightest degree, and openly contrary to the terms and provisions of the deed which is or ever can be the only evidence in the case, as to the real contract of the parties thereto. A decree of the court itself, rendered in violation of these Acts of Congress in these Indian matters, is absolutely void. *Bell v. Fitzpatrick*, 157 Pac. 334; *Goodrum v. Buffalo*, 162 Fed. 817; *Bowling v. United States*, 233 U. S. 528, 58 L. ed. 1080. Where a court undertakes to decree the specific performance of a contract of a restricted Indian for his restricted lands, the same is a nullity and will be set aside, as was done in *Bowling v. United States*, above cited. There is but one way by which the lands in controversy could or can be acquired from Hannah Canard Barnett by B. O. Sims, or any other person, and that was and still is, by a "conveyance" of her interest therein, made strictly in accordance with the provisions of section 9, of the Act of Congress approved May 27, 1908. But the deed to Sims was not obtained as therein provided, hence it is a nullity and passed nothing, and could not have been, and was not, legally approved.

4th. Because, it being thus admitted in the record that, at the time of her death, Mahaley Watson, the deceased allottee, lived, resided and had her place of abode in Okfuskee County, Oklahoma, the County Court of said Okfuskee County alone had the power and jurisdiction to approve a deed for said lands, and we respectfully maintain that the County Court of said county never in fact approved said deed of Hannah Canard Barnett to said B. O. Sims, dated March 22, 1909, on the 17th of June, 1913, or at any other time; and that the alleged approval thereof of said date is, and always has been, a nullity and absolutely failed to operate as an approval of said deed, and, without a valid approval, said deed is likewise a nullity and conveyed nothing whatever to said Sims or anyone else.

Alleged Approval of the Deed by County Court of Okfuskee County Is Illegal and a Nullity.

We maintain that said alleged approval of the County Court of said Okfuskee County is illegal and therefore a nullity:

(a) Because said deed purports on its face to be a general warranty deed for said land and thereby to convey both the legal and equitable title and the entire estate in said land, which it could not do and did not accomplish, for the reasons above assigned, inasmuch as Hannah Canard Barnett did not have the legal title to said land at the time of said convey-

ance and could not convey the same at that time and her after-acquired title would not and did not pass under said deed. If to this it should be said that she then had the equitable estate in said land and could convey it because the lands had been previously selected as provided in section 22, of the Act of 1906, we answer that even if she could have done so, she did not convey, or attempt to convey, simply the equitable title to said land in said deed to Sims, but undertook to convey thereby the fee simple title as conclusively shown by the deed itself, and the courts have no power to make a contract for the parties and then seek to enforce it; nor could said County Court add anything to or take anything from said deed in its attempt to approve the same. *Midland Oil Company v. Turner*, 179 Fed. 77, and *Wood v. Jennings*, 192 Fed.

(b) Because said County Court purports to have approved said deed on an additional consideration of \$2,000.00, paid by said Litchfield, and not said B. O. Sims, and as to which both consideration and approval said Hannah Canard Barnett had no knowledge and had not consented to, as shown by her testimony in this case, and the same was therefore simply a verbal agreement on the part of Litchfield to pay said \$2,000.00 by reason of which said approval was thus obtained, as shown upon the face of said approval, thereby attempting to add something to the terms and provisions of the deed with-

out the knowledge of said appellant, and as to which she could not be bound either in law or equity; that by such proffer to pay such additional consideration, a new contract for said land was thus attempted to be made, to which Hannah Canard Barnett was not a party, as she had no knoweldge of it, and the same gave said County Court no power or jurisdiction to approve said deed.

(c) Because said deed was so taken by said Sims with no intention or purpose of having the same approved by the said County Court of Okfuskee County, but to be approved by the County Court of Hughes County, and was therefore taken with no intention whatever by the parties thereto of complying with the provisions of section 9 of said act approved May 27, 1908 as charged—paragraph 10 of appellees' cross complaint—and was therefore illegal, null and void in its inception, under and by reason of section 5 of said act, and therefore could not be legally approved by said court more than four years thereafter, but the whole proceedings were absolutely null and void as held in *Bartlett v. Okla Oil Company*, 236 Fed. 488.

(d) Because said alleged approval, if in fact ever made at all, was made simply by A. P. Smith, the judge of the County Court of said Okfuskee County, and not by said court, and at his own home and residence while confined to his bed of sickness of which he died shortly thereafter, and the same was

not recorded by the clerk of said court at any time thereafter upon the request or direction of said County Court, if such court could have directed the same, which we deny. While respecting the decisions in *United States v. Black*, 247 Fed. 942, and the former opinion of that court in this case adhering thereto, we respectfully submit that since the testimony was taken in this case after being remanded, the case materially differs from that of *United States v. Black*, in this, that in the *Black* case the County Court of Hughes County had not been adjourned but was in session, potentially at least, at the time the county judge signed said approval, and the same seems afterward to have been recorded under the authority of the court, as indicated in that decision. In the case at bar, the County Court of Okfuskee County, finally adjourned on May 20, 1913, which, under the law of the state, could not again be convened during that term, and the same was again adjourned on the first Monday of July by the sheriff and clerk of said court which again adjourned the court for the term, and which was not convened thereafter until the 6th of October, 1913, during a great portion of which time after the death of Judge Smith there was not even a judge of said court. The *Black* case was based apparently on section 1823 of the Statutes of Oklahoma, which provide that said courts shall always be open and in session for the transaction of all probate business in their respective counties, and it was on the theory

that such courts were always open for probate business and that such approvals are probate business that these prior decisions were made. But we respectfully submit that probate matters in Oklahoma are fixed and determined by the constitution and statutes of the state, and the approval of a full-blood heir's deed for his inherited property does not come within the provision of this state law. Hence, the approval of such a deed is not probate matters within the meaning of said law, but is an independent power conferred upon County Courts of Oklahoma by Congress alone through section 9 of said Act of 1908, and when performing such duties it is termed a federal agency. *Marcey v. County Commissioners*, 45 Okla. 1, which decision is cited with approval by this court in the case of *Parker v. Richard*, 250 U. S. 235, 63 L. ed., at page 967, where it is again referred to as a federal agency, and in that case this court pointed out that under said section 9 "if the court approves" the heir may "sell and convey his interest in such land". That case and *Harris v. Bell*, 254 U. S. 100, 65 L. ed. 159, have been decided by that court since the above decisions. In the *Harris v. Bell* case the court holds specifically in reference to the deceased allottee that "he resided and died in what afterwards became Wagoner County, and under the local law the County Court of that county is the one which at the time of the conveyance would have had jurisdiction of the settlement of his es-

tate." Here in both of these late decisions the Supreme Court holds that such approvals must be made by the *County Court*. This by necessary implication would exclude the power of the judge of such courts to perform this approval, although such judge could approve the will of a full-blood Indian, as authorized in section 8 of this Act of 1908. (For numerous other decisions of courts holding approval must be by the "court" as contradistinguished from the judge thereof, see the same cited under the Ninth Assignment of Errors.) The Supreme Court of Oklahoma has repeatedly held that the state laws do not apply to these Indian matters but that they are governed alone by these Acts of Congress, and in the case of *Molone v. Wamsley*, 195 Pac. 485, the Supreme Court of Oklahoma held as unconstitutional an Act of the Legislature of 1915 which undertook to prescribe the way and manner such approvals of deeds of full-bloods should be made. The act was passed for the benefit of the Indians and to protect them in their rights under these Acts of Congress, and was in fact greatly to their interest and for their protection. But the Supreme Court held that the legislature of the state did not have power to legislate on this subject, and set the act aside. If this new act of the state made directly for the benefit and protection of the Indians was held to be void and not applicable to such approvals because the legislature had no jurisdiction to pass it, then it must follow as inevitable that prior acts of said state

could have no application. The words "having jurisdiction of the settlement of the estate of said deceased allottee," used in section 9 of the Act of 1908, is simply an adjective phrase simply describing what County Court had jurisdiction to approve such deeds; *Brown v. Belmarde*, 3 Kan. 351; and while such courts might be in session at all times for probate matters under the laws of the state, it doesn't follow that they are open at all times for the approval of a deed of a full-blood, as such approvals are not embraced within such probate matters as defined by the laws of the state. The testimony of Nat Dossy, the clerk of the County Court of Okfuskee County, shows conclusively that A. P. Smith was not in such court or such court in session on June 17, 1913; that said County Court was never in session after the 20th of May, 1913, until October, and that at no time after the 20th of May, 1913, did said A. P. Smith hold court, or was in court, or was in his chambers, but all that while was confined to his bed and died in July thereafter. The record also fails to show that said alleged approval was placed of record under the authority or direction of said County Court, but does show that in some way the same got into the clerk's office, and the same was transcribed on a book by the clerk, Nat Dossy. This lacks every element of a judicial or ministerial action of the County Court of Okfuskee County in the approval of such deed, and is therefore nugatory.

(e) Because there is no competent evidence in the record that said deed was ever approved by the County Court of Okfuskee County, not only for the reasons just assigned, but for the further reason that the evidence tended to show that such approval was in writing and signed by A. P. Smith; but, if the same ever existed, it was not produced on the trial of this case and no evidence adduced as to what had become of it. But there was evidence shown in the record that the same was sought by appellants but could not be found. The appellees then produced what purports to be a copy of pages 384 and 385 and 391 of a record of Indian approvals kept in the office of said court, which in fact makes the same simply a copy of a copy entered on said book, without any authority of law whatever for so recording the same. There is no provision whatever in section 9 of the Act of 1908 for recording such approvals, and since said act of the state legislature was nullified by the State Supreme Court, there is no law of the State of Oklahoma requiring or permitting such approvals to be recorded anywhere. Hence, said recordation is absolutely without authority, has no validity and therefore no probative force. On page 70 the appellees offered in evidence a copy of said deed, and on page 75 offered in evidence a purported copy of said approval, but appellants objected thereto for nine distinct reasons, which are found on pages 73, 74 and 75, but the same was overruled by the court and excepted to, as shown on page 76.

We still maintain that said objections are good and that the action of the court is erroneous and that all other evidence pertaining to said deed or approval is incompetent.

**Approval of Deed, If Obtained at All, Was Obtained
by Fraud, Concealment, Deception and
Misrepresentation.**

We also maintain that said deed and purported approval were absolutely null and void, not only for the reasons assigned, but the further reason that said alleged approval, if in fact ever obtained at all, was obtained by fraud, concealment, deception and misrepresentation, practiced upon both Hannah Canard Barnett and A. P. Smith.

It is conclusively shown that as soon as Hannah Canard Barnett discovered that Sims had a deed for the Mahaley Watson land instead of the lands of her deceased father, she set about to employ an attorney to recover the same, and thus employed George C. Crump by this contract and lease of the 27th of March, 1913. The suit was brought four days afterwards in the District Court of Creek County, where the lands were situated, but removed therefrom to the federal court by the defendants therein; that on the 2nd of May, Sims filed his disclaimer of any interest in the land. Sims and Litchfield and others were defendants in that suit, as shown by the petition in the record. It is apparent from the record that Litchfield, Wallace and Crump then set about to settle said suit and put the title to said

lands in said Litchfield, without the knowledge or consent of Hannah Canard Barnett, but all the time concealing it from her and representing to her that the money she was to obtain was \$2,000.00, to be paid her by Crump to relieve him from his contract of employment, but in fact paid by said Litchfield, and represented to Judge Smith that it was additional consideration for said deed.

This undertaking was evidently commenced on the 26th day of May, 1913, by Crump selling out to Litchfield and making him said quitclaim deed and contract and then repairing to Weleetka, either accompanied by Wallace or where Wallace was on said date, and there having this conversation with Hannah Canard Barnett above referred to about being released from said contract of employment, and promising to pay her \$2,000.00 that day. But on going to Okemah that day with Wallace they found Judge Smith was sick and that they were unable to see him, and consequently such matters were not accomplished that day and Hannah did not get the \$2,000.00 on that day as so planned. The petition had been drawn up by Crump & Skinner, and he had made the above note on the same requesting the approval of the same, but said nothing to Hannah about settling the suit or having that deed approved. All the while she was acting under his advice and supposed the \$2,000.00 was coming from him for such release of his contract. On the 17th of June, 1913, they go back to Okemah and this time find

Judge Smith still sick, but after going to his home she was admitted into his presence after Wallace had first gone in and talked to him. Nothing then happened of importance so far as she knew except Wallace handed Judge Smith a draft for \$2,000.00, made payable to Hannah, and Judge Smith handed it to Hannah and she took it and went away supposing it was the money Crump had promised her. Nothing was said then or at Weleetka about that deed being approved or the suit settled, so far as she knew. She was unable to speak or understand English, and in fact knew little that was going on. But it seems that Patterson was there also and had a check for \$2,000.00 for Crump, and the two checks for \$2,000.00, one to Crump and the other to Hannah, were exhibited to Judge Smith. But there is no evidence in this case that Hannah knew that Patterson had the check for Crump. On the other hand, she testified that she never knew that Crump got any money at all.

It is easy to believe, if the facts, indeed, don't conclusively show it, that by this exhibition, the presentation of this petition, the request thereon of Crump and the payment of \$2,000.00 by Wallace to Hannah, that Judge Smith actually believed that they were all there for the purpose of having said deed approved for the additional consideration of \$2,000.00, and thereby completely deceived in the true facts. Not only that, but the record discloses that outside of this \$2,000.00 check held by Patter-

son, Crump received \$5,000.00 in the transaction, five-sixths of which was divided among Stanford, Turner and others. At the same time he was representing Hannah Canard Barnett in the action and participating in this effort to get that deed approved, which of itself, if successful, would defeat her action and her whole rights to the land, and at the same time receiving this money from the opposite side. He also entered into these agreements with counsel for Litchfield to dismiss those suits with prejudice and to quite the title to the land in Litchfield, and decrees were accordingly so entered in both the District Court of Creek County and in the federal court. All of such conduct and action was done in open violation of his contract of employment and the provisions of his 99-year lease; but we are informed by her testimony that she had no knowledge of such matters, as above set forth in her testimony. Thus we believe it is conclusively shown that the pretended approval was brought about in this surreptitious manner, if at all, and in so doing, that Crump got the \$5,000.00, at least, and perhaps \$7,000.00.

On the former appeal of this case, in delivering its opinion therein, on page 400, the Circuit Court of Appeals observed:

“(7-9) We come now to the serious issue in the case. The cross-bill and the offer of proof show that Hannah Barnett’s attorney, Crump, while purporting to act as her counsel, in se-

curing the approval of the deed, and in causing a decree to be entered in her case against Sims and Litchfield, forever barring her right to the property, was, in fact, acting on behalf of Litchfield, and upon a consideration paid by him, and that Hannah was wholly ignorant of what was going on when the deed was approved. While the allegations of the cross-bill are indefinite, we think they are sufficient to forbid a summary disposition of the cause, such as was made. It was the duty of the court to proceed with the trial of the case, to hear the proofs of the defendants, and, if the merits of the controversy required an amendment of the cross-bill, permission should have been granted to amend it. If the charge was substantiated, the approval of the deed was a nullity, and the charge was of too serious a character to be disposed of without a full trial. The cross-bill stands upon the same ground as an original bill seeking to set aside an order approving the deed. It was not a collateral attack. That a court of equity has jurisdiction to set aside judgments obtained by fraud or collusion is not open to doubt. *Arrowsmith v. Gleason*, 129 U. S. 86, 100, 9 Sup. Ct. 237, 32 L. ed. 630; *Simon v. Southern Railway Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. ed. 492; *Burt v. Gotzian Co.*, 102 Fed. 973, 43 C. C. A. 59; *Young v. Sigler* (C. C.), 48 Fed. 182; *National Surety Co. v. State Bank*, 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394. If the solemn judgments of courts can be thus set aside, much more can the administrative acts of a County Court, approving the deeds of Indians for inherited lands. One who seduces an agent to betray his principal, or an attorney his client, can hold none of the fruits of his

bargain. *Alger v. Anderson* (C. C.), 78 Fed. 729, and cases there cited.

“(10) Plaintiffs claim to be bona fide purchasers. That, however, is an affirmative claim, and must be proven by the party who seeks its benefit. *Wright-Blodgett Co. v. United States*, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. ed. 637.

“The decree is reversed.”

Part of page 113 of the record is as follows:

“The Court: Ask her if she knew of Crump receiving five thousand dollars from Litchfield or any other person by which the matter was to be compromised—that is on the theory of the evidence.

“Mr. Davidson: It may be on the theory but that is not what the evidence tends to show, at all.

“The Court: Shows he received five thousand dollars.

“Mr. Davidson: Yes, but not from Litchfield employing him.

“The Court: But the court might find it under the status of this record. If I make special findings I would find it. If he were to stay off the witness stand and Skinner stay off the witness stand and they have all this evidence in here I would take their silence—proceed.”

Thus, notwithstanding this declaration of the trial judge and the former decision of that court, that, “If the charge were substantiated, the approval of the deed was a nullity, and the charge was of too serious a character to be disposed of with-

out a full trial," etc., as show in the above excerpts, the appellees on the trial of this case failed to put either Crump or Skinner or Wallace on the witness stand to deny or disapprove the testimony of Hannah Canard Barnett, and we respectfully submit that the charges of thus receiving this money from the opposite side and making these contracts and agreements with Litchfield, contrary to his contract of employment, etc., without the knowledge or consent of Hannah Canard Barnett, is thereby "*substantiated*," and that "*the approval of the deed was a nullity*."

In this excerpt from said former opinion in this case, it is observed that "One who seduces an agent to betray his principal, or an attorney his client, can hold none of the fruits of his bargain. *Alger v. Anderson* (C. C.), 78 Fed. 729, and cases there cited." As it is clearly shown that Crump got at least five thousand dollars in this business, without the knowledge or consent of his client, and contrary to the written contract and lease of his employment, the question arises: Did Litchfield seduce Crump to betray his client, or did Crump seduce Litchfield to get the money in violation of his employment?

If Crump seduced Litchfield for his money and settled the case in that way, he betrayed his client according to the terms of his contract of employment, of which Litchfield had notice, as said contract was filed as "Exhibit A" with said petition, and said lease was filed of record in the office of the

register of deeds of Creek County on the 2nd of April, 1913, and of which said Litchfield had personal notice, as shown by his contract with said Crump, on page 18 of the record, where said lease, the date of its record and the book and page, is therein specifically pointed out, and of which recordation not only said Litchfield but said Kunkel and the Prairie Oil and Gas Company had public notice, from said suit and said recordation.

If Litchfield seduced Crump by paying this money, then, under the above decision, he can have none of the fruits of his bargain, and Hannah Canard Barnett still had a right of action over against them; and as such fraud and deception rendered said approval a "*nullity*," as so held, this in turn rendered the deed also a nullity for want of a legal approval, as required in section 9 of said Act of Congress approved May 27, 1908. Consequently neither the legal nor equitable title to said lands was ever conveyed by said deed or passed from the heir, Hannah Canard Barnett, and she is still the owner in fee simple of said land and entitled to the immediate possession thereof, and to reversal of this case, for it is expressly provided in said section:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land. *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court hav-

ing jurisdiction of the settlement of the estate of said deceased allottee.”

So that such a deed must first be approved by such a court before it is valid, and here by this former decision it is held in effect that an approval obtained by fraud and corruption is a nullity, and, being a nullity, it is no approval at all. The same thing was held by the Supreme Court of Oklahoma in *Canfield v. Jack*, 188 Pac. 1040, and quoted and relied upon in this former decision in the case at bar. In *Parker v. Richard*, 63 L. ed. 954, it was held by the Supreme Court of the United States that death did not remove such restrictions, but simply qualified them so as to permit them to be sold as provided in said section 9.

**To Ascertain the Intent and Purpose of Congress, the
Acts Must Often Be Given an Equitable
Construction.**

In *Beley v. Naphtaly*, 169 U. S. 353, 42 L. ed., page 777, the Supreme Court observed:

“The Act of Congress should not be so construed as to except from its remedial provisions those who were without an actual grant while at the same time filling every other requirement of the act, unless the language used therein is open to no other interpretation.

“Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view, for *qui haeretin lihera, haeretin cortice*. In Bacon’s Abridg., Stat. 1; 5

Puffendorf, bk. 5, Chap. 12; Rutherford, pp. 422, 527, and in Smith's Comm., 814, many cases are mentioned where it was held that matters embraced in the general words of statutes, nevertheless, were not within the statute, because it could not have been the intention of the law-makers that they should be included. They were taken out of the statutes by an equitable construction. In some cases the letter of a legislative act is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter. The equitable construction which restrains the letter of a statute is defined by Aristotle, as frequently quoted, in this manner: *Equitas est correctio legis generaliter latæ, qua parti deficit*. *Riggs v. Palmer*, 115 N. Y. 506, 510 (5 L. R. A. 340), opinion, EARL, J."

Appellees Are Not Innocent Purchasers.

On the trial of this case the appellees made no claim whatever to any rights in the lands arising under or by virtue of said contract between Crump and counsel for Litchfield in said suit, or said judgments rendered by reason thereof by said federal court or said District Court of Creek County, which judgments by their terms put the title in Litchfield, but their total invalidity was so patent on the face of said contracts and judgment that the same could not have been sustained even had they insisted upon it, for various reasons not necessary here to give, as they were not relied upon. Neither on the trial did said appellees make any effort to disapprove the

testimony of the appellant or the fraud thus practiced in the case, but they, as well as the trial court, seemed to rely all the way through on the notion that Kunkle and the Prairie Oil and Gas Company were innocent purchasers of said land, notwithstanding said alleged approval and deed may have been procured by fraud and corruption—having no part in the same themselves, that they took said lands under said deeds from Litchfield and others free of such consequences, fraud and corruption.

But we respectfully submit and maintain that said appellees are not innocent purchasers from any conceivable legal standpoint and for the following reasons :

(a) Because that is an affirmative plea, and must be set up and properly pleaded by those who claim the benefit, as shown in the above excerpts and the decisions following.

In the decision of the Supreme Court of the United States in *Boone, et al., v. Chiles, et al.*, 10 Pac. 177, 9 L. ed. 388, the court held as follows :

“In setting it up—a bona fide purchase without notice by plea or answer—it must state the deed of purchase, the date, parties, and contents briefly; that the vendor was seized in fee, and in possession; the consideration must be stated, with a distinct averment that it was bona fide and truly paid, independently of the recital in the deed. Notice must be denied previous to, and down to the time of paying the money and the delivery of the deed; and if notice is specifi-

cally charged, the denial must be of all circumstances referred to, from which notice can be inferred; and the answer or plea must show how the grantor acquired title. The title purchased must be, apparently, perfect, good at law, a vested estate in fee simple. It must be a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity. Such is the case which must be stated to give the defendant the benefit of an answer or plea of an innocent purchaser without notice; the case stated must be made out, evidence will be permitted to be given of any other matter not set out."

To the same effect is *Hawley v. Dillard*, 178 U. S. 476, 44 L. ed. 1157, and *Wright-Blodgett Company v. United States*, 236 U. S. 397, 59 L. ed. 637, hereinbefore cited, in both of which cases this *Boone* case was cited with approval, and in the last case, on page 640, an extensive excerpt was taken as to the manner of pleading the doctrine of innocent purchaser, and where numerous other decisions on that subject are likewise cited. Here it is pointed out, among other requisites of such a plea, that it must show that

"The title purchased must be apparently perfect, good at law, a vested estate in fee-simple * * * it must be by regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity."

In these cases it is held that those claiming to be bona fide holders or innocent purchasers of land must have the legal title thereto and the whole estate therein in fee simple before the doctrine of innocent purchaser will have any application.

We have previously shown that the legal title to the lands in controversy was not conveyed to Sims under said deed, because at that time the same was not owned or held by Hannah Canard Barnett, and when so acquired by her five days thereafter, when said patents were recorded as required in section 5 of said Act of 1906, such legal title did not pass, as after-acquired title of Indians in their restricted lands are never conveyed under previously executed deeds therefor, as shown in *Starr v. Long Jim*, and other cases above cited. This feature alone is sufficient to defeat the whole claim of these appellees, not only to the lands, but to their plea of being innocent purchasers; for, to be such, they must have the legal title to such lands and then present their claims in proper form as so held in the above cited decisions.

(b) The plea of Kunkle as an innocent purchaser will be seen on page 63, and that of the Prairie Oil and Gas Company on pages 66 and 67 of the record. But by inspection thereof it will be observed that the same does not conform to the requirements of said decisions; and when appellees undertook on the trial to introduce evidence on this feature of the case, the appellants objected, but the court permitted

them to amend, to which action of the court appellants excepted, as shown on pages 125 and 126. But still said pleas do not conform to the law in such cases as defined in said decision. Said pleas do not state the consideration paid by either Kunkle or the Prairie Oil and Gas Company. Kunkle alleges that he paid more than \$20,000.00 for said conveyance, and the Prairie Oil and Gas Company alleges it paid more than \$5,000.00 by way of bonus, when in truth the consideration for said lands purchased by Kunkle and the bonus thereon was \$550,000.00, and the same was paid by a check of the Prairie Oil and Gas Company to Litchfield, as shown on page 130 of the record. This seems to have been paid on the 12th day of May, 1914, as there shown, and not on the 6th day of said month when Kunkle got his special warranty deed for the lands. Thus it seems that in fact Kunkle paid nothing for the lands, but by an agreement with the Prairie Oil and Gas Company made at the same time, the Prairie Oil and Gas Company simply gave Litchfield its check for the \$550,000.00 consideration six days after Kunkle got his special warranty deed for the lands. It is true that Litchfield and others seem to have given a warranty deed also on the 12th of May, but whatever title, if any, Litchfield, Booth and Chaney had in said land, had been conveyed to Kunkle by the deed of May the 6th, which was six days before the payment of the consideration. It is evident from the testimony of Kunkle that there must have been an understanding

all the time between these appellees respecting the purchase of these lands and the leasing thereof, as the company paid the consideration and afterward Kunkle and others assigned all their interest to the Prairie Oil and Gas Company in a contract dated the 12th of May, 1914, which is the date of both said lease and warranty deed, although such assignment is dated April 15, 1916, as shown on page 152 of the record. Thus a relationship between Kunkle and the Prairie Oil and Gas Company seems to have existed at this very time, and of a nature so confidential that the Prairie Oil and Gas Company paid the \$550,000.00 directly to Litchfield instead of to Kunkle, which seems to have been agreeable to Kunkle.

This plea of Kunkle does not state that the consideration was paid by him at all at any time, and in his plea he "charges and avers that his purchase of said land and the payment of the consideration therein mentioned (but not the \$550,000.00) was in reliance upon the record made as to the various transactions mentioned and referred to, and in reliance upon the apparent legal title as shown thereby in said grantor" (page 64; the parenthesis is ours). "The various transactions mentioned and referred to" necessarily refer back to the chain of title given by Kunkle in his bill, which shows numerous quit-claim deeds. Practically the same charge is made in the answer of the Prairie Oil and Gas Company, as shown on page 67.

On page 63 of the record, Kunkle in said plea alleges in substance that on the 6th day of May, 1914, he obtained from Litchfield and others a warranty deed, whereby they sold him the lands in controversy; that said grantors were seized in fee and were in possession of said lands. But does not allege that he thereby acquired the fee simple title to said land; and by referring to said deed of May 6th, 1914, on pages 28 and 29, it will be observed that the same is not a warranty deed at all, but is and purports to be simply a special warranty deed. In his bill Kunkle relied upon this deed of May 6, 1914, and not upon the deed of May 12, 1914, as shown on the face of said bill, at page 7 of the record, the latter deed being nowhere given in the chain of title in said bill.

The deed of May 12th was brought into this record by the appellees to show, or at least to tend to show, the limitations in said deed of May 6th and the attempt thereafter to cure it through the deed of May 12, at the time that the appellees were dealing between themselves, and the latter deed doubtless obtained at the instance and request of said Prairie Oil and Gas Company, thus acting through said Kunkle; for in this agreement between said Litchfield, Booth and Chaney with said Kunkle, dated the 12th day of May, 1914, this deed of May 6, 1914, is recited as a certain special warranty deed for said lands, and it is further recited that "on the date aforesaid" Litchfield and others interested

in said lands, assigned all of their right, title, claim and interest in and to the oil and gas rights on the aforesaid property to said W. A. Kunkle and undertake to specially warrant the title to said land to the extent of their respective interests conveyed by each, and then closes the agreement with the following express provisions:

“The undersigned grantors and assignors also agree for themselves, their heirs, executors or administrators, to use their best efforts to secure the execution and delivery of a general warranty deed from all of the grantors and assignors first herein named, conveying said lands to said grantee, his heirs and assigns, within 90 days from this date.

“Executed this 12th day of May, 1914.

R. L. LITCHFIELD,

THOS. J. BOOTH,

H. G. CHANEY,

R. D. WALLACE,

W. T. TRIPPETT,

F. L. SAWYER,

(Rec., p. 152.)

V. A. HAYS.”

Thus it is shown that when Kunkle purchased said land and took such special warranty deed on the 6th of May, 1914, or at least soon thereafter, he knew that his deed was defective and thus sought to get a warranty deed for said lands and for the oil and gas rights therein belonging to Wallace, Trippett, Sawyer and Hays, who seem to have had the

same on the same date as said special warranty deed, as evidenced by this agreement; and thereby is shown that Kunkle did not obtain the fee simple title to all the right, title and interest in said lands by his special warranty deed, but afterward assigned that contract and agreement over to the Prairie Oil and Gas Company, on the 15th of April, 1916, as shown on page 152 of the record, thus showing again that as late as this latter date Kunkle had not obtained a complete fulfillment of said contract, although it was therein agreed that it should be done within ninety days from its date.

It is also shown by said assignment that the Prairie Oil and Gas Company had not acquired all the oil and gas privileges under said land under its lease from Kunkle on May 12, 1914, and did not obtain the same until procuring this assignment on the 15th of April, 1916, as indicated by said assignment on page 152 of the record, which was after this present suit was brought and cross complaint filed therein.

Thus it is shown by the pleas or answers of the appellees that such pleadings were not sufficient to conform to pleas of innocent purchasers, as defined in the above cited decisions of the Supreme Court, and they show that the objections of the appellants to the introduction of any evidence on that aspect of the case should have been sustained, and that the court erred in overruling the same and permitting them to amend.

This special warranty deed and this agreement and assignment also show that neither Kunkle nor the Prairie Oil and Gas Company were innocent purchasers of said land or of the oil and gas rights thereunder, but had knowledge of the defects in said title thus attempted to be perfected, as of the very date said Prairie Oil and Gas Company took said lease, and six days after Kunkle had taken the special warranty deed on which he relied in his bill of complaint filed in this case.

(c) Neither Kunkle nor the Prairie Oil and Gas Company were innocent purchasers, for the further reason that, as shown by the bill of complaint, many of the deeds through which they were claiming said land and the oil and gas rights thereunder were simply quitclaim deeds and some special warranty deeds, which fact alone put them on notice of the defect of the title to said land.

See *Oliver v. Piatt*, 3 How. 333, 11 L. ed. 622, which held:

“A purchaser by a deed of quitclaim without any covenant or warranty, is not entitled to protection in a court of equity as a purchaser for a valuable consideration, without notice, and he takes only what the vendor could lawfully convey.”

Also, *Dickerson v. Colgrove*, 100 U. S. 584, 10 Otto 578, 25 L. ed. 618, where it was held:

“A grantee by deed of quitclaim is not a bona fide holder.”

And *Baker v. Humphrey*, 101 U. S. 494, 11 Otto 494, 25 L. ed. 1065, where the Supreme Court again held:

“2. No one taking a quitclaim deed can stand in the relation of a bona fide purchaser.

“3. An attorney can in no case, without his client's consent, buy and hold otherwise than in trust any adverse title or interest touching the thing to which his employment relates.”

(d) Both Kunkle and the Prairie Oil and Gas Company had constructive notice of the rights and the interests of Hannah Canard Barnett in and to said lands and that she still held the legal title thereto, at the time of their alleged purchase and lease and at all times prior thereto, back to the 27th of March, 1909: (1) Because said lands were the allotment of Mahaley Watson, as disclosed by the patents therefor admitted of public record in the office of the Commissioner to the Five Civilized Tribes, and came to her through said Act of 1906, and could be conveyed only as in said Act and the Act of May 27, 1908, expressly provided, and the same are public acts, of which all persons must take notice. Hannah Canard Barnett, being a full-blood Creek Indian and so enrolled, could not alienate said land except upon a valid deed legally approved as provided in said acts. Said rolls of the Five Civilized Tribes were likewise public acts, and gave public notice that the blood and age of the members thereof were fixed by said acts and made conclusive on all persons whomsoever. Section 5 of said Act of

1906 publicly disclosed that at least the legal title to such allotment was governed thereby and included the present allotment, as shown by the certificate and patents therefor, and could not be legally conveyed until said patents were recorded in the office of said Commissioner. The recordation of such patents on the 27th of March, 1909, publicly disclosed that the legal title to said lands had not vested in Hannah Canard Barnett at the time said deed was made to said Sims on the 22nd of March, 1909. As both said Kunkle and said Prairie Oil and Gas Company were bound to take notice of all such facts in dealing for said land, and are severally bound by the notices thereby given, they therefore could not be innocent purchasers. (2) Said acts, patents and the recordation thereof and the limitations of restrictions on the alienation of said land imposed by said acts, were likewise public notice that said Hannah Canard Barnett, being thus a full-blood Creek Indian and so enrolled, could not make under said acts a general warranty deed for said land, as was so undertaken in the said deed to said Sims, as said facts thus disclose, likewise disclose that, on March 22, 1909, said Hannah Canard Barnett held only the equitable title to said land, if in fact she then had any title at all, and could not then convey the legal title thereto; and that under the law governing such Indian affairs the legal title thereto afterwards acquired could not legally pass under or be conveyed by said deed to said Sims, even though it had been

legally approved by the proper court, after such legal title had afterwards been acquired by her; and that, therefore, as a consequence thereof the said Hannah Canard Barnett at all times thereafter, including the month of May, 1914, and up to the present time, still owned said lands or at the least the legal title thereto, and without such legal title to said lands, neither said Kunkle nor said Prairie Oil and Gas Company could be innocent purchasers, under the case of *Hawley v. Dillard* and others, above cited. (3) Because said Litchfield, Kunkle and the Prairie Oil and Gas Company had public notice of the rights and interests of the said Hannah Canard Barnett in and to said lands, through said suit brought in the District Court of Creek County and removed to said federal court, and also from the recordation of said contract and lease made between her and the said George C. Crump, her attorney in said suit, which said lease was duly recorded with the register of deeds of said Creek County on the 2nd day of April, 1913, and there duly recorded in book 89, at page 244, as shown on page 159 of the record, and of which said Litchfield had personal knowledge, as shown in his contract of purchase with said Crump on the 26th of May, 1913, as shown on page 18 of the record, where the same and its recordation are specially mentioned. They also had public notice thus disclosed not only of the rights and interests of Hannah Canard Barnett in said lands, but her purpose thereby to recover the same,

and of the terms, provisions and conditions of her contract and lease with said Crump, whereby said Crump was forbidden and prohibited by such terms and provisions from settling or compromising said suit or disposing of his rights in said land; and thereby they had public notice of the invalidity of said contract and deed of said Crump to said Litchfield and the violation by said Crump and Litchfield of the terms and provisions of said contract and lease, and could not under the law plead their want of knowledge of all of said facts thus publicly disclosed and of which they, under the law, had to take public notice, and by which the rights and interests of said Hannah Canard Barnett were thus protected. (4) Because said suits, having been brought in said District Court and transferred to the federal court were matters of public notice and the said agreements therein entered into between said Crump and counsel for said Litchfield were filed therewith in said courts thus attempting to dismiss said proceedings with prejudice and quiet the title thereto in said Litchfield, contrary to and in violation of the law governing such matters, and the terms and provisions of said contract of employment with Crump according to their very terms and provisions on the face thereof and the decrees therein rendered gave public notice of the total invalidity of said whole transaction, of which said Kunkle and the Prairie Oil and Gas Company had, under the law, to take notice and were bound thereby. (5)

Because said deeds to said Sims, having been recorded on the 26th of March, 1913, thereby gave public notice of its nature and character and purported to be a general warranty deed for the fee simple title to said lands, which in truth under said Acts of Congress could not have been so given, either at the time of the date of said deed or when so recorded, and was therefore illegal and invalid and could never at any time then or thereafter be legally approved even by the County Court of Okfuskee County, of which said Kunkle and the Prairie Oil and Gas Company again had public notice and were legally bound thereby. (6) Because said Kunkle and the Prairie Oil and Gas Company, under said conditions above mentioned, had public notice of the fact that on March 22, 1909, Hannah Canard Barnett did not then have, and could not convey, the legal title to said land, and that the same did not pass or was conveyed under said deed to said Sims; that she acquired the legal title thereto for the first time on the 27th day of March, 1909, after said patents were recorded, as made and provided in section 5 of said Act of 1906; that such legal title thereto could not, and did not, pass under said deed to said Sims, even though said deed had then or thereafter been attempted to be approved by the County Court of said Okfuskee County; and that, therefore, at all times after March 27, 1909, to the present time, Hannah Canard Barnett held, and still holds, the legal title to said lands, and that said deed to said Sims was therefore illegal

and was taken in violation of, and contrary to, the provisions of said act, and was therefore absolutely null and void and passed no title whatever, because of said acts and the conduct of said parties connected therewith, of which they had at least public notice, as aforesaid; and, therefore, they had notice of the legal rights and interests of said Hannah Canard Barnett in said lands, or at the least such notice of material facts thus disclosed from the public records and acts as would have led them to actual notice and information that she was claiming said lands and all rights therein, had they have investigated such matters, as the law requires under such conditions.

In *Winsted v. Schank*, 173 Pac. 1041, it is held in substance that whatever is notice enough to excite attention and to put a reasonably prudent person on his guard and calls for inquiry, is notice of everything to which such inquiry might have led had the same been properly made. To the same effect is *Shauer v. Alterton*, 151 U. S. 607, 38 L. ed. 286; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. ed. 1063. As this lease to Crump was recorded on the 2nd of April, 1913, and also referred to his contract of employment and made the same a part thereof, this likewise put Kunkle and the Prairie Oil and Gas Company on notice both of said lease and contract. *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843; *Livingston v. Maryland Insurance Co.*, 3 L. ed. 421. Whether these covenants run with the land or

not, these instruments all constituted links in the chain of title, and all persons holding thereunder must be held to have notice of them. *Joy v. St. Louis*, 34 L. ed. 843. (7) As this 99-year lease to Crump was so placed of record, making part thereof said contract of employment of said Crump, which lease and contract thus prohibited said Crump from settling said suit or in anywise disposing of any interest therein before the title to said lands were quieted in Hannah Canard Barnett, as therein made and provided, unless such settlement, etc., should be approved by the County Court of said Okfuskee County, and as said contract and quitclaim deed to said Litchfield were also recorded, thus showing a violation of said contract and lease, these facts put said Kunkle and Prairie Oil and Gas Company on notice of the invalidity of such transactions, as the same were never approved by the said County Court of said Okfuskee County.

Again, said Kunkle and the Prairie Oil and Gas Company were thereby given public notice, not only of such violation, but whatever other illegal or fraudulent transaction did, or might have been consummated by said Crump and Litchfield, or either of them, in violation of said contract of employment and of the rights and interests of Hannah Canard Barnett in and to said land. The testimony of Kunkle taken in this case shows that at the very time he was dealing with the Prairie Oil and Gas Company as to said oil and gas lease made to it on the

12th day of May, 1914, Litchfield was right there with and among them and participating in said transaction, and produced the papers to said Prairie Oil and Gas Company, as shown on pages 129 and 130 of the record. Hence, either Kunkle or the Prairie Oil and Gas Company could have easily ascertained from Litchfield what he paid Crump in procuring said contract and deed from him and in getting said suit settled. Besides, said contract made between said Crump and Litchfield is dated May 26, 1913, and on the 18th of June, 1913, the same was recorded in the office of the recorder of deeds of said Creek County in book 85 at page 458, and on the face of said contract it is expressly provided that said contract was made "subject, however, to the limitation, restrictions and liabilities therein imposed, insofar as the same affects" the lands therein described, as shown on page 19 of the record, and refers specifically to said oil and gas lease to said Crump, and the book and page of its recordation, which oil lease in turn on its face made said contract of employment a part thereof. Therefore it thus appears of public record through these instruments that this contract and quitclaim deed, made between Crump and Litchfield, were made subject to the limitations, restrictions and liabilities imposed by said lease and contract of employment between said Crump and Hannah Canard Barnett.

Hence, again, said Kunkle and the Prairie Oil and Gas Company had, through those instruments,

also public notice of the nature and character of these transactions between said Crump and Litchfield and of the rights and interests of Hannah Canard Barnett reserved to her and expressly provided in said 99-year lease and said contract of employment with said Crump.

Such public records thus given in all the matters above referred to were amply sufficient to defeat any rights or interests that may have been acquired by said deeds to said Kunkle or the oil lease to said Prairie Oil and Gas Company, for said Kunkle and said Prairie Oil and Gas Company will not be permitted to even controvert such a notice. *Townsend v. Little*, 109 U. S. 504, 27 L. ed. 1012; and, Congress having imposed these restrictions and provisions in these several acts for the benefit of these Indians, *Heckman v. United States*, 224 U. S. 413, 56 L. ed. 820, every person who takes a transfer of such property must be held affected by notice of them. *Texas v. White*, 74 U. S. 700, 19 L. ed. 227, 7 Wall. 743.

Nor is Kunkle or the Prairie Oil and Gas Company relieved from the force and effect of such public notice or their duty to first investigate said matters to ascertain the truth about the rights and interests of Hannah Canard Barnett in and to said lands, simply by reason of the fact that this pretended or alleged approval of the County Court of said Okfuskee County of said deed to said Sims appeared of record in a book kept in the office of

said County Court, as so claimed in this case, and a copy of which copy was produced by them as evidence on the trial, for there is no provision whatever, as heretofore stated, in any of these Acts of Congress, and particularly in said Act of May 27, 1908, or in section 9 thereof, for recording the approval of deeds of full-blood heirs therein provided for; and as Congress alone had the power to make such requirements, no other legislative power or act of any court or person could require the same. Hence, the recordation of such approvals are without the authority of law and especially without the sanction of Congress, and, having no validity, and being thus illegally and without authority of law so placed in such a book, the same imparts no legal notice to anyone that such an approval had in fact ever been made, and such a copy or pretended record is not even competent evidence of such an approval and cannot be accepted by the courts even in proof of such an approval or as grounds of notice thereof, or upon the grounds of a purchaser of such lands thus limited being an innocent purchaser thereof, for, such a purchaser is not only bound to take notice of such restrictions thus imposed upon the alienation of such property, etc., as so held in *Texas v. White*, and other decisions that could be cited, but we find it held by this court in *Burch v. Taylor*, 152 U. S. 634, 38 L. ed. 578, point 5, that:

“Constructive notice of a contract cannot be implied from the fact of its record in the

office of the clerk of the county, where there is no statute providing for such record."

It will be borne in mind that the approval itself was never produced on the trial of this case, although it was set up and relied upon in the bill of complaint, the execution of which was specifically denied by the appellants, which thus imposed the burden of proof to show its valid existence upon the appellees. Thus it is shown that no competent testimony on that point was produced, as we will show later on in this brief.

Not only this, but the invalidity of these dealings between Crump and Litchfield and the fact that the duties, rights and obligations of Crump arising out of his lease and contract of employment could not be transferred by him or assumed by said Litchfield, as so undertaken in said contract between them, as the same was confidential and fiduciary as between Crump and Hannah Canard Barnett, and the transfer thereof was not only contrary to said contract of employment, but was in violation of public policy, to be dealing with these restricted Indian lands in such a manner. *Sage v. Hampe*, 235 U. S. 99, 59 L. ed. 147. In *Burck v. Taylor*, 152 U. S. 634, 38 L. ed. 578, in the syllabi we find it was further held:

"1. As a general rule, a contract made in contravention of a status is void and cannot be enforced.

"2. Where, in a contract with a state, the

contractor agreed not to assign the contract in whole or in part without the consent in writing of the state authorities, such agreement is binding not only upon the parties, but upon all others who seek to acquire rights in it.

“3. When rights arising out of contract are coupled with obligations to be performed by the contractor, and involve a relation of personal confidence, the contract cannot be assigned by him without the consent of the other party.”

The testimony of Hannah Canard Barnett shows conclusively that she had no knowledge whatever of these transactions between Crump and Litchfield. Therefore she was not a party to them and was not bound by them. Kunkle shows by his testimony that in this purchase he relied upon an abstract of the title to the land, but does not know what it contained, as he did not examine it himself, but supposed, likely it contained this contract with Crump, etc. He shows also that both he and the Prairie Oil and Gas Company seems to have relied upon the same firm of lawyers in the examination of such abstract of the title to said land. Such abstract more than likely disclosed these transactions between Crump and Litchfield, for such instruments had all been placed of record some eight or nine months before Kunkle and the Prairie Oil and Gas Company took such deeds and lease. Then both Kunkle and the Prairie Oil and Gas Company are chargeable with having direct notice of all such matters thus contained in

the abstract, and such other matters as they could have found out by proper diligence, for notice to the attorney is notice to the client.

—*Smith v Ayer*, 101 U. S. 332, 11 Otto 330, 25 L. ed. 955;

Rogers v. Palmer, 102 U. S. 263, 12 Otto 263, 26 L. ed. 164;

Hoover v. Wise, 91 U. S. 308, 23 L. ed. 392;

Armstrong v. Ashley, 204 U. S. 272, 51 L. ed. 482;

and *Harrington v. United States*, 78 U. S. 356, 11 Wall. 356, 20 L. ed. 167, point 5, where it is held:

“The rule that notice to the agent is notice to the principal, applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction and present to his mind at the time he is acting as such agent; provided it be of such a character as he may communicate to his principal, without breach of professional confidence.”

If the abstract did not contain these matters of record pertaining to said land, then it was not a true abstract, and Kunkle and the Prairie Oil and Gas Company would be chargeable not only with negligence in examining said title, but likewise with public or constructive notice of what the records did disclose, and with whatever else they could have reasonably found out about such title, with reasonable diligence. They were so negligent in such matters that neither of them seem ever to have seen or

examined the original approval of said Sims' deed by the County Court of Okfuskee County, if in fact ever made, and do not produce the same in evidence on the trial of this case, or attempt to make the slightest explanation of where it is or why they did not produce it, although under section 5099 of the Revised Laws of Oklahoma, 1910, it is provided that it must first be shown that the original instrument thereby entitled to be recorded is not in the possession or under the control of the party desiring to use the same, before certified copy thereof can be used at all. But no effort was made to show that said original approval was not in the possession or control of either Kunkle or the Prairie Oil and Gas Company, who, on the trial, relied alone upon said copy of said purported copy on said book, the invalidity of which, through the objections of the appellants, was then pointed out and interposed to such use of said copy, as shown on pages 72 to 75, inclusive. But such objections were overruled and excepted to by appellants. Such approvals cannot legally be admitted of record under said section 5099 or under any other provision of said state laws, as the same is not embraced or included under such state statutes. All such Indian matters have been repeatedly held by the Supreme Court of said state to be governed alone by these Acts of Congress, as may be shown in the case of *Smith v. Williams*, cited with approval in the case of *Molone v. Wamsley*, 195 Pac., on page 485, where it was held:

“From the beginning it has been the settled policy of this court, and also of the federal court, in determining the validity of deeds to restricted Indian lands, to look to the Acts of Congress alone,”

citing numerous decisions of that court, and of this court.

In this *Molone* case that court also held that the right and power to regulate and control the sale of Indian lands in the State of Oklahoma remained vested exclusively with Congress; that under section 9, of the Act of May 27, 1908, the provisions thereof constitutes the County Court, having jurisdiction of the estate of a deceased Indian allottee, a federal agent, vested with the power to approve conveyances of the interests of full-blood heirs in such inherited lands; and that the act of the County Court in approving the conveyance of such full-blood is a ministerial, and not a judicial act; and as to chapter 198 of the state legislature of 1915, wherein it sought to control and direct such approvals, it further held that the state legislature had no power to enact a statute that affects the validity of conveyances by full-blood Indian heirs; that such power was vested exclusively in Congress, and such act of the legislature is simply directory and not mandatory, and the failure of such County Court to comply with the terms of the act or to require the vendor or vendee to comply with the act does not invalidate such conveyance.

Here the direct decisions of these courts holding that the power and authority over these Indian deeds and their approval is vested alone in Congress, and these state decisions holding that the same is not vested and cannot be controlled under the state law of Oklahoma, not even in a direct act passed by the legislature for that purpose, and even in aid of the Indians in such matters, and that the same are not binding on such County Courts but they may ignore the act with impunity without invalidating the conveyance. If the legislature of the State of Oklahoma cannot by direct legislation affect such matters or bind such County Courts, it is too evident for dispute that such County Courts of the state cannot legislate on the same subject by attempting to require their approval to be recorded without any authority whatever, either from the state or the federal government; and it is just as evident that such an attempt to so record the same is wholly without authority, and being such it imparts no validity whatever to such approvals and does not operate as public notice, and a purported copy thereof on the trial of a case is wholly incompetent and not admissible, especially when openly objected to by the opposite side for such reasons as was done by the appellants on the trial of this case.

It must therefore follow that said alleged copy of the copy of the alleged approval of the County Court of said Okfuskee County was improperly and

illegally introduced in this case and relied upon by the court; and as it was not shown by the appellees that the original approval thereof, if ever made, was lost and could not be found, or was not in the possession or control of Kunkle or said company, all secondary evidence thereof was incompetent, and being objected to by the appellants, it leaves this whole record completely destitute of any legal evidence of any such an approval by said County Court. Without legal proof of its approval said deed to Sims was absolutely void and was in turn incompetent as evidence, and the objection thereto, as well as to said approval, should have been sustained by the court, thus leaving the appellees without any legal or competent evidence whatever of any rights or interests in said land, but showing conclusively that said lands still belong to the appellant, Hannah Canard Barnett, and that she is entitled to the immediate possession thereof, with the right of an accounting for all the oil and gas taken therefrom against these appellees.

**The Conduct of Crump and Litchfield Operated as a
Fraud Against the Acts of Congress.**

Appellants are of the further theory that said conduct of Crump and Litchfield, heretofore mentioned, operated in the premises as a fraud against these Acts of Congress, and upon Hannah Canard Barnett, and upon the County Court of Okfuskee County, and the judge thereof, as charged in her

cross complaint, and thereby rendered said alleged approval a nullity, as so held by said Circuit Court of Appeals in its former opinion in this case.

We believe it is conclusively shown in the record in this case that Crump received at least \$5,000.00 from Litchfield under said transactions between them, as shown by the testimony of Stanford, Turner and Smith, who were interested in said transaction and received a part of the money thus obtained. No one denies their testimony. Hannah testified that she knew nothing about Crump having received the money from Litchfield, but that Crump had promised her the \$2,000.00 to be relieved from his contract of employment, and that she supposed that the \$2,000.00 she received was paid for that purpose. No one denies or disputes this testimony in the record. She also says that Wallace took her to Okemah on the day she had this conversation with Crump, but that she did not see Judge Smith that day. Patterson testified that on the 17th of June, 1913, Wallace was present and that Judge Smith talked to Hannah through an interpreter by the name of McDermott. Thus, the record discloses that Crump, Skinner, Wallace and McDermott were each and all competent and most material witnesses for the appellees in this case—but not one of them was produced. There is an old principle of equity which provides in effect that, where one is apparently full handed in proof of material facts in his case, but fails to produce it, the

presumption of law is that if produced it would have been against him.

The charges of the appellants in their amended cross complaint are practically the same along these charges of fraud as their original cross complaint which said court formerly held, if established, rendered such approval a nullity. We respectfully submit that such charges are not only fully and completely established by the testimony of the appellants taken on the trial, but the same are undenied. Therefore the same renders this pretended approval of the County Court of Okfuskee County, dated the 17th of June, 1913, a nullity. That of itself leaves the deed to Sims a nullity and wholly inoperative to convey any rights or interests thereunder because not approved at all, as is required in section 9 of the Act of 1908, and therefore the appellants were entitled to recover the land in this suit, and are now entitled to a reversal of said decision.

We contend that said appellees are not innocent purchasers of said lands, and can never be held to be such purchasers in this case, for the reason that there never can be such a thing as an innocent purchaser of the restricted lands of a full-blood Indian under any circumstances, arising through his deed therefor or its approval thereof, where fraud, deception, concealment or misrepresentation were resorted to to procure, and did procure, such deed or approval,

regardless of whether the same is practiced by or upon the Indian grantor or by the fraudulent grantee, or by or upon the County Court thus attempting to approve the same.

We also assert that under the circumstances just mentioned, there can be no such a thing as a *voidable* Indian deed for such restricted land; but that all such deeds for such lands, are either absolutely null and void and convey no right, title, interest or estate whatever to the grantee or anyone else; *or*, they are absolutely valid when properly obtained and approved and convey all the right and interest the Indian may have in such land. In other words, all such Indian deeds for such restricted lands, are either valid and convey all right and title of the Indian, when properly obtained and approved; *or*, absolutely null and void and convey nothing whatever when thus improperly obtained or improperly approved.

It is an old adage that fraud vitiates everything, and it has been held time out of mind that a deed or contract obtained by fraud may be set aside in a court of equity. It is also held that a deed or contract obtained by fraud, deception, etc., is simply *voidable*, and that if the fraudulent grantee therein conveys the land to one who was entirely innocent of the fraud thus practiced, he takes and holds said lands as an innocent purchaser. But even that doctrine is good only when the fraudulent grantee has thereby procured the legal title as well as the equit-

able title in the lands conveyed and there is nothing of record in the transaction to disclose the fraud or any evidence that would lead to the discovery of the fraud. That doctrine applies also only between persons *sui juris* thus dealing together in such matters. In the case at bar Hannah Canard Barnett is not *sui juris*, and, therefore, was not free to deal with such lands as she might think proper or as might have been done by another *sui juris* owning the same. She could sell and convey said land only in the way and manner prescribed by the Acts of Congress, and only then when she had acquired both the legal and equitable title thereto. This she did not do, for the numerous reasons herein before stated, and did not have the legal title when she made the deed to Sims, and therefore did not, and could not, convey the same under said deed for the reasons above given. We also maintain that the approval was absolutely null and void because of the fraud thus practiced, and as so held by this court on its former decision.

As above stated in a former part of this brief, a full-blood Indian deed for restricted lands was held to be void because of fraud practiced at the time of its approval, in the case of *Canfield v. Jack*, and relied upon in said former decision of this court in this case, and other reasons. And the same was held by the same court in *Mandler v. Rains*, 174 Pac. 240. In *Jackson v. Brown*, 15 Johns. 264, it was held that

where the deed was void the approval was likewise void, the court saying:

“If the deed to Gillett was void for maintenance, in consequence of adverse possession, it would seem to me that the approbation of the surveyor general would follow the fate of the principal or subject matter, and that it would be a void execution of the power intrusted to him. His assent being given to a deed that could have no effect or operation in law, was not an execution of the power vested in him, and could not preclude his approving of a valid deed. Indeed, the Act of 1810, which confers the authority on the surveyor general of approving deeds given by Indian patentees, or their heirs, restricts the approbation to legal deeds; the deed, then, if given, not being legal, the approbation on that ground was void, and being void, it is a nullity.”

In *Clark v. Akers*, 16 Kan. 166, it was held that an Indian deed made in violation of an Act of Congress is null and void and “could not create even an equitable estate in the land in favor of the grantee, even though he paid the purchase money”.

In *Smythe v. Henry*, 41 Fed. 705, it is held that a void Indian deed does not give color of title and does not constitute an estoppel in the hands of the heirs.

In *Doe v. Partier, et al.*, 12 Sm. & M. 425, it is held that all the prerequisites of the acts must be performed before the legal title passes. In *Bridges v. Samples*, 43 Fed. 102, it is held that all such prerequisites must be performed before the title passes, and

the deed made previously is void and the record thereof is not notice to a subsequent vendee.

In *Richardsville v. Thorpe*, 28 Fed. 52, it was held that, "where the validity of such a deed is in issue before said court, and the proof shows that the grantor therein falsely personated the real heirs, and thereby actually misled the official who approved the conveyance, the deed will be held void."

See, also, *Moore v. Dobbins*, 96 U. S. 531, citing *Shepley v. Cowan*, 91 U. S. 340, holding when fraud is practiced upon or by the officer, suit may be brought to set the same aside, etc.

In *Laughton v. Nadeau*, 75 Fed. 789, it was held:

"Parties dealing with Indians must take notice of public treaties and Acts of Congress, and do not take land as bona fide purchasers relieved of restrictions on alienations merely because no restrictions appeared on the patent. Proceedings void for want of jurisdiction cannot be cured by ratification or waiver."

The same was held in *Bartlett v. Okla Oil Company*, 236 Fed. 488.

A deed made in contravention of federal statutes is void, and should be rejected as evidence. *Libby v. Clark*, 118 U. S. 250, 30 Law. ed. 133.

An Indian deed obtained by fraud may be avoided in a court of equity, although for valuable consideration and duly approved. *Anderson v. Lewis Freeman*, Chy. 178.

We might extend these citations to numerous other decisions of other courts holding that an Indian deed taken in violation of these Acts of Congress and without complying with the prerequisites, is absolutely null and void, but that would serve no use or purpose in this case, as the right of Hannah Canard Barnett to sell and of B. O. Sims and others to buy the land in controversy is fixed by these Acts of 1906 and 1908, which must be complied with before such deed is valid and before any title whatever can possibly pass under such a deed, even though apparently approved, for unless said acts are strictly complied with, or if said acts are violated, such deed is absolutely void, as declared in section 16 of the Supplemental Creek Agreement, section 19 of the Act of April 26, 1906, and section 5 of said Act of May 27, 1908; and the same has been recently so held by our Supreme Court in *Johnston v. Barnett and Davis*, 198 Pac. 489.

Here, section 5, of the Act of 1908, has direct application to the deed of Hannah Canard Barnett to Sims, for it was in full force and effect at the time that deed was attempted to be made and afterwards attempted to be approved. This section, in substance, provides that any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney or other method of incumbering lands, made *before or after* the approval of this act, which affects the title to lands allotted to allottees of the Five

Civilized Tribes, prior to the removal of restrictions therefrom, * * * shall be *absolutely null and void*. Here, the deed purports to be a general warranty deed and made on March 22, 1909. At that time Hannah Canard Barnett could not make such a deed, because the prerequisites for such a deed had not at that time accrued to her under said acts, and she did not possess, hold or own such a title as she thereby undertook to convey. Hence, it was nothing but an "*attempted alienation by deed*," referred to in section 5, of the Act of 1908, and it was made *after* the approval of said act, but before the restrictions from said lands were removed, as such restrictions could not be removed under said act until she made a valid deed for said lands and the same was legally approved, as provided in section 9, of said act. This was not done, but she did attempt to alienate by that deed, which attempted alienation is declared absolutely null and void under section 5, of said Act of 1908. Now, it having been shown that the pretended approval thereof was thus obtained by fraud and was therefore a nullity, as so held on the former hearing of the case, that, indeed, should end this whole case in favor of Hannah Canard Barnett, as both deed and approval would be absolutely null and void under said statute and section and under the decisions above cited.

But we allege that fraud practiced in the procurement of the deed or its approval rendered the

deed absolutely void, and not voidable; that there is no such thing as an innocent purchaser of restricted Indian lands from a restricted Indian, where the deed is brought about by fraud. The cardinal principles underlying this proposition and leading to such a result are, among others, 1, that Congress alone has plenary power over such Indians and their restricted lands, and can alone legislate on such subjects; 2, that such Acts of Congress alone furnish the law applicable to said subjects, and can neither be limited nor enlarged by any other legislative body, court or person, and such provisions must be construed strictly in the alienation of said lands and strictly complied with; 3, that the restrictions of alienation upon such lands were so placed there by Congress to safeguard and protect the Indian and his rights to such lands and to even guard him against his own improvidence. *Heckman v. United States*, 224 U. S. 413, 56 L. ed. 820; *Lykins v. McGrath*, 184 U. S. 169, 46 L. ed. 485; *United States v. Flournoy*, 71 Fed. 578; *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. 531; 4, that this intent and purpose of Congress was the actuating cause which induced Congress to pass said acts, and must always be observed and adhered to; for it is the first principle in construing the statutes that the intent of the legislator must first be ascertained, and all things else must be blended and conformed to that intent and purpose in the application and enforcement of said statute; 5, that by thus imposing

such restrictions Congress intended that such lands could be sold only in accordance with, and in strict compliance of the terms and provisions of the acts, and until alienated in strict accordance therewith, that such lands should be under the control and direction of the federal government, which authority should be released only after the alienation of such lands in strict accordance with the provisions of the acts; 6, that the jurisdiction of the state should not extend to such Indians and their restricted lands until Congress emancipated such Indians and entirely removed such restrictions, either by such alienation strictly in accordance with the terms and provisions already provided by said acts, or by subsequent legislation; and 7, if fraud, deception, concealment or advantage illegally obtained over such Indians in the procurement of their lands by deed, mortgage, contract to sell, etc., could be utilized under said acts, then the same would be a direct violation of the terms and provisions of said acts and thereby openly and directly violate the very intent, object and purpose of Congress in thus permitting such alienation under said acts, and would thereby utterly defeat the provisions of said acts and totally destroy the very means and measures therein imposed for the protection and safeguarding of the Indian and his restricted lands, and the very intent and purpose of Congress in thus imposing such restrictions to protect and safeguard the Indian in such alienation of his restricted lands.

In other words, it is our contention that, if fraud and deception practiced to obtain either the deed of a restricted Indian for his restricted Indian lands or its approval, simply make such deed or such approval *voidable* only, as under the *general law* respecting deeds or instruments obtained by fraud, etc., then it necessarily follows from such premises that other legal consequences arising therefrom must also be recognized, and that, therefore, if such a fraudulent grantee would, after obtaining such a deed and approval, make a warranty deed for such lands to another who had no connection with, or knowledge of, such fraud and deception, the latter deed would convey to him the fee simple title to such Indian lands, free and absolutely divorced from all the restrictions and limitations imposed by Congress upon the alienation thereof in these several acts, and that thereby the very intent and purpose of Congress to thus safeguard and protect the Indian and his interest in such land as thus made by the acts would be totally and forever defeated and annihilated by the fraud and imposition thus practiced, notwithstanding the acts themselves forbid and prohibit any such a result. Thus, fraud and imposition, practiced by the Indian himself, or upon him by the fraudulent grantee, or upon or by the federal agency created by the act for the approval of such deeds, would thus become paramount to the Acts of Congress themselves, and would thus dominate in the alienation of said lands by vile

means necessarily forbidden and prohibited by the acts.

It cannot be conceded for one moment that Congress itself ever intended by its enactments that the very terms and provisions of the acts should, or ever could, be thus defeated and rendered absolutely nugatory by fraud and deception, for such would implicate and stultify Congress itself in thus passing such acts, thus so easily defeated. Courts will not permit litigants to make or even intimate such infidelity against Congress, nor can the courts themselves entertain such conclusion, in passing upon matters created and governed by its enactments. Thus it is easily seen that if such a deed or approval of the same is to be held or construed as simply voidable, and not absolutely void, when thus obtained by fraud or deception, the most solemn Act of Congress passed for the protection of its Indian wards and their restricted lands could be easily defeated simply by a trick, fraud or deception practiced either by or upon the Indian himself, or by or upon the federal agency thus created by Congress for the purpose of protecting the Indian and his interest.

Fraud may be practiced in its most offensive form by strict observance of the *forms of law*, and at the same time resorting thereto for the fraudulent purpose of accomplishing a fraudulent design.

—*Graffam v. Burgess*, 117 U. S. 180, 29 L. ed. 839;

Johnson v. Waters, 111 U. S. 640, 28 L. ed. 547;

Young v. Sigler, 48 Fed. 182;

Burt v. Gotzian & Co., 102 Fed. 937;

Arrowsmith v. Gleason, 129 U. S. 86, 32 L. ed. 630.

In *Atkins v. Fiber Disintegrating Co.*, 18 Wall. 272, 21 L. ed. 844, this court observed:

"The intention of the law-maker constitutes the law. *U. S. v. Freeman*, 3 How. 563. A thing may be within the letter of the statute, and not within its meaning, or within its meaning, though not within its letters; *Slater v. Clave*, 3 Ohio St. 85, 7 Pac. Adr. Tit. Stat. 1, 2, 3, 5. In cases of admitting of doubt the intention of the law-maker is to be sought in the entire context of the section, statutes or series of statutes *in pari materia*. *Patterson v. Winn*, 11 Wheat. 389; *Dubois v. McLean*, 4 McL. 489; 1 Cooley, Black. 59; *Doe v. Brandling*, 7 Barn & Co. 643; *Steel v. Zouch*, Plowd. 365."

See, also, *Jones v. N. Y. Guarantee and Indemnity Co.*, 101 U. S. 622, 11 Otto 622, 25 L. ed. 1034.

Where the words of an act are ambiguous and the intent is plain, courts will give effect to the will of Congress as thus plainly expressed. *Dewey v. United States*, 178 U. S. 510, 44 L. ed. 1174.

Thus it is apparent from these Acts of Congress and the restrictions therein imposed, that it was never the intent or purpose of Congress in their enactment that either the acts themselves should be de-

feated or the rights and interests of the Indian in his restricted land should be thus destroyed or obtained from him by any form or manner of fraud, deception or machination of any kind practiced either by or upon him, or by or upon such federal agency; but it was the intention of Congress that any such fraud, etc., should have no force or effect whatever upon said acts or the rights and interests of such Indians in such restricted lands, and that all deeds obtained by fraud should thereby be and become absolutely null and void, as so provided in said respective acts, as shown in section 16, of the Supplemental Creek Agreement, section 19, of the Act of April 26, 1906, and the Act of May 27, 1908, and particularly as therein provided in sections 2, 4, and 9, thereof, where violations of said act are expressly declared to be "absolutely void," "void," and "absolutely null and void," as may be seen in said respective sections of said acts. But nowhere in any of said acts has Congress *declared*, or even *implied*, that any such violation, whether in the form of deeds, contracts, powers of attorney or other acts, should be, or be construed as simply, *voidable*, but in every such provision of said acts the thing forbidden thereby was declared to be void, absolutely void or absolutely null and void, as so declared in said sections 16, 19 and 5 of said respective acts above referred to.

As such acts have thus expressly declared such deeds, contracts, agreements, etc., to be "absolutely

void" and "*absolutely null and void*," there is not even a vestige of legal grounds therein to be found on which such deed, etc., can possibly be held to be "*voidable*." Such acts will not bear any such construction that an action or conduct violating the terms and provisions of said acts is simply *voidable*. It is plain from the acts themselves that it was the intent and purpose of Congress to *prohibit* the alienation of such restricted Indian lands *absolutely*, unless the provisions of the acts were strictly complied with in the execution of deeds therefor and their approval, and that no title whatever should be conveyed thereby unless the terms and provisions of said acts were first actually and strictly complied with *in the way and manner* therein provided, and all other means or methods of obtaining such lands are by necessary implication arising from said acts strictly forbidden and prohibited, as was so held in *Stephens v. Smith*, 19 L. ed. 933.

Such being the intent and purpose of Congress, as so provided in said acts, it is too apparent for dispute that it was the intention of Congress that the title to such inherited lands should be and remain in said Indians, and be restricted as in said acts provided, until such Indians should convey the same of their own free will and for a valuable consideration *in the way and manner expressly provided in said acts*; and if any other manner was resorted to or any fraud or deception practiced in procuring

deeds, etc., for such restricted lands, that the same should be absolutely null and void and the title to said lands still remain vested in said restricted Indians, after the pretended execution of such pretended deeds, etc., the same as before they were thus attempted to be obtained or approved. Any other view of such matters will totally defeat the intent, object and purpose of Congress in imposing such restrictions and then expressly providing how the same may be removed in the alienation of said land, as shown by the acts; and we have seen by the above decisions that it is the intent and purpose of Congress, expressed in the acts, that must first be ascertained and consulted, and when thus discovered must be followed absolutely, even though it leads to the total defeat and absolute destruction of such deeds or approvals. In short, such a deed or approval thereof, obtained or procured by fraud or deception, either direct or indirect, active or constructive, passes no title whatever, legal or equitable, in or to such restricted Indian lands. Such fraud and deception operates, in other words, as a forgery against both the spirit and the letter of said acts, and, therefore, conveys no right, title or estate whatever in or to such land, even though in form executed and in form attempted to be approved. The title thereto remains all the time still vested in the restricted Indian, as if nothing whatever had been done.

Hence, it is a legal impossibility for such a deed or undertaking thus brought about by fraud and deception, to be simply voidable, but in every such case it is "*absolutely null and void*," as declared in section 5, of the Act of May 27, 1908, and the restrictions imposed upon said lands through said Acts of Congress are never removed thereby, nor is the authority and control of federal government over such restricted lands ever lost by such fraudulent deeds or actions as to such restricted lands. As such, restricted Indians are never divested of their right, title or estate in such restricted lands by such fraudulent deeds or approvals and as the federal government still has jurisdiction and control over such Indians and restricted lands thereafter the same as before such fraudulent conduct, *there can be no such a thing as an innocent purchaser of such lands, while the same remains thus restricted and under the control of Congress*, as the title thereto never in fact left the Indian, and therefore could not vest in anyone else under such fraudulent conduct. In short, the restricted Indian is never thereby divested of his title to such lands, and the title thereto never thereby vests in another, under such fraudulent contract. Hence, there can be no *actual purchaser*, whatever, of such restricted lands under such fraudulent conditions; and however *innocent* the alleged claimant therefor may be, is never a purchaser at all, and takes nothing whatever for his trouble, even though he has paid the agreed consideration.

There is still another ground unnoticed why one who deals with restricted Indians or as to his restricted lands can never be an innocent purchaser and thereby be exempt from the force and effect of these Acts of Congress. The doctrine of innocent purchaser implies within itself that the purchaser's title to the land is necessarily defective by reason of some previous fraud or wrong, with which that purchaser had no connection, and of which he had no knowledge or notice at the time he purchased the lands and paid the agreed consideration therefor. This principle seems to rest on the idea that the law shields the innocent, and imposes the penalty upon the wrongdoer, and if there be more than one wrongdoer, to impose that penalty upon the one who was the most closely connected with the wrong. Thus, if the grantor in the deed has been induced to execute it and thereby convey his land, through the fraud, deceit or misrepresentation of the grantee, and that grantee conveys the land to an innocent purchaser who pays the consideration, without knowledge or notice of the fraud thus practiced, the law will ordinarily protect the innocent purchaser; but at the same time it gives the grantor a legal right over against the fraudulent grantee for the true value of the lands, thus protecting both the grantor and the innocent purchaser.

But that doctrine has no application to the restricted lands of a restricted Indian, for all those who deal with such lands have public notice from the

Acts of Congress that such lands are restricted and their alienation are either prohibited absolutely for a given time specified in the act, or can be alienated only upon the performance of the terms, provisions and conditions expressly made and contained in the particular act governing such lands; and if such act provides the way and manner in which such lands can be conveyed, that by necessary implication *prohibits a conveyance thereof in any other manner*, and that any other manner of conveyance, or any violation of such terms and provisions, render such alienation absolutely null and void, as so declared in said act, all of which the whole world has notice in dealing with such Indians or with or concerning their restricted lands, as was so held in *Laughton v. Nadeau*, 75 Fed. 789, and other decisions on that subject. Hence, every person dealing with such lands is thus put on public notice of the terms and provisions of such acts, and are thereby put on guard to see to it that such acts have been complied with in the previous attempted alienation of said lands. Hence it is that the most solemn judgment or decree of a court seemingly having full jurisdiction of such matters will not divest the restricted Indian of his restricted lands, where such Acts of Congress have been ignored or violated, as may be seen in *Bell v. Fitzpatrick*, 158 Pac. . . . ; *Goodrum v. Buffalo*, 162 Fed. 817; *United States v. Bowling*, 223 U. S. 528, 58 L. ed. 1080, and *Privett, et al., v. United States*, 256 U. S. 201, 65 L. ed. 889, decided April 18, 1921, nor will such

a judgment or decree on either the law or the facts prevent the United States from afterward bringing a suit on behalf of its Indian ward to set aside such judgment and former conveyances and restore such lands to such ward, as shown in the last two cases above cited.

In *Bell v. Fitzpatrick*, *supra*, a proceeding was had in the state court to confirm majority upon the Indian minor, who afterward undertook to convey her lands, whereupon her guardian instituted suit to set the sale aside but failed to prosecute it, and the title was quieted in the grantee. When the Indian became of age she brought suit to recover her lands, and these prior judgments were set aside and annulled and the lands restored to the Indian allottee, thus granting relief against the judgment on behalf of the Indian herself.

Goodrum v. Buffalo, *supra*, was instituted by Arthur Buffalo, a minor, by J. F. Robinson, his guardian, against the plaintiffs in error, and here again the judgment was set aside at the instance and on behalf of the Indian minor.

The case of *United States v. Bowling*, *supra*, involved the lands of William Wea, a member of the confederated tribes of Peoria and other tribes in Oklahoma. The lands involved were restricted in his hands and his heirs for a period of twenty-five years, the same as in the *Buffalo* case. During that time William Wea died and his heirs undertook to

sell the lands within the twenty-five years, and brought suit for specific performance against the purchaser and obtained a decree in their favor, whereupon their deed was executed to the purchaser and he in turn conveyed the lands and thereafter they were conveyed by mesne conveyances. The government brought suit to restore said lands to said heirs, to set aside said decree and conveyance, and the same was set aside by a decree of the Circuit Court of Appeals, as shown in 191 Fed. 19, and was then taken on to the Supreme Court of the United States and was affirmed.

The case of *Privett v. United States, supra*, involved the homestead of a Creek allotment. The allottee died intestate in 1911, leaving as his heirs a widow and adult daughter and a minor son, all of whom were Creek Indians. Thereafter deeds were made to Privett purporting to convey said lands and executed by the heirs, a deed for the minor being made by his guardian, and these were the conveyances sought to be cancelled, and the ground on which they were assailed is that the minor son was born after March 4, 1906, and therefore that the lands passed to the heirs subject to the qualification and restriction imposed by a proviso in section 9, of the Act of May 27, 1908, securing such homestead to such minors until April 26, 1931. There had been a prior suit in the state District Court, in which the court held that the son's birth was February 23, 1906, and this decree was urged as conclusive. But the federal

trial court refused to be bound by the same and found that the son's birth was April 23, 1906, and this holding was affirmed by the Court of Appeals, 261 Fed. 351. It was then taken to the Supreme Court and again affirmed. In this case, both the Court of Appeals and the Supreme Court refused to be bound as to either the law or the facts thus held in the state court, and throws wide open the gates for investigation of both law and facts in all these Indian cases.

In both the *Buffalo* and *Bowling* cases the court held that the restriction on the land ran with the land as to both the allottee and the heirs for the length of time thus restricted. By reference to the Acts of Congress involved in the case at bar, it will be seen that alienation by the allottee or his heirs was prohibited for five years in the Original and Supplemental Creek Agreements, and in section 19, of the Act of April 26, 1906, such allotments there described were forbidden to be sold or conveyed for twenty-five years, except by an Act of Congress; and in section 1, of the Act of May 27, 1908, restrictions are imposed as therein provided until April 26, 1931. Thus these restrictions run with the land under these acts the same as under the act involved in the *Buffalo* and *Bowling* cases, which was for twenty-five years.

The case of *United States v. Bowling, supra*, is especially interesting and instructive as to the doctrine of innocent purchaser, for there it will be ob-

served there were several mesne conveyances in that case, the same as in the case at bar. But that fact did not defeat the suit or relieve the mesne grantees of the rigor of the Act of Congress there involved.

Thus, it is conclusively shown that a suit to set aside conveyances obtained in violation of these acts may be brought by the restricted Indian himself, as was done in the first two cases above mentioned; or, may be brought by the federal government, as was done in the last two cases above cited, to which may be added *Heckman v. United States*, 224 U. S. 413, 56 L. ed. 820; *Goat v. United States*, 224 U. S. 457, 56 L. ed. 841, and numerous others.

It is apparent from these decisions that the federal government, in its protection of its Indian wards under its enactments, restricting and prohibiting the alienation of their restricted lands, gives no countenance whatever to the doctrine of innocent purchaser. Then why should that doctrine *be applied* to a suit brought by the restricted Indian himself on the ground of such violation, when it could *not be applied* to a suit brought by the federal government for the protection of the same Indian, and on and for the same grounds and reasons?

In *Jefferson v. Winkler*, 26 Okl. 653, 110 Pac. 755, and in *Campbell v. Hickory*, 182 Pac. 484, it was held by the state Supreme Court that the probate courts of Oklahoma had no jurisdiction over these Indian minors and their property, except under and

as provided by the Act of May 27, 1908; in *Gannon v. Johnson*, 40 Okl. 695, 140 Pac. 430, that the *rule of property* had no application to these Indians or their lands under these Acts of Congress; and in *Ashton v. Noble*, 162 Pac. 784, it was held that the state law on champerty had no application to such Indians or lands; in *Bell v. Fitzpatrick*, *supra*, it was held that the state law as to majority had no application to such Indians or their property; and we might go on with numerous other decisions holding and deciding that the state laws or statutes of Oklahoma did not apply to these Indians or their restricted lands, but that the disposition and control of such restricted lands and such restricted Indians are governed solely by these respective Acts of Congress; and wherever there is a conflict between said acts and such state law, the state law does not apply and has no force or effect. It was directly so held in *Williams v. Smith*, and adhered to in *Molone v. Wamsley*, 195 Pac. 484, thus setting aside an act of the legislature as unconstitutional because attempting to intermeddle with the Act of Congress respecting the approval of deeds of full-blood heirs to their inherited property.

It should not be overlooked that the doctrine of innocent purchaser is simply an equitable principle and is in the nature of an estoppel, derived from the general law. But we have shown in the case of *M. K. & T. Railroad v. Mo. Pac. Railroad*, 97 U. S. 491, 7

Otto 491, 24 L. ed. 1097, heretofore cited, that the common law and equity principles have no application to these Indian matters, but that they are governed alone by the express provisions of the Acts of Congress. Then, why should the doctrine of innocent purchaser have any more application in these Indian matters than other state laws? To apply such a doctrine is thereby to make this doctrine an exception to all other rules and principles governing these Indian affairs, and without any legal grounds whatever in doing so.

In section 16 of the Supplemental Creek Agreement it is expressly provided that any contract or agreement made in violation thereof shall be absolutely void and not susceptible of ratification, and that no rule of estoppel shall ever prevent the assertion of its invalidity. This provision has never been repealed. But this would have been the law under these Acts of Congress, even had it not been expressly so provided, as unquestionably such was the policy and intent of Congress in all these acts. Thus, as held by this court in *Bartlett v. Okla Oil Company*, 236 Fed. 488, and in *Laughton v. Nadeau*, 75 Fed. 789, the Indian himself was prohibited from ever ratifying any act violative of such acts, nor could he waive the same at any time thereafter; nor could the courts allow the intervention of any rule of estoppel to prevent the assertion of such invalidity. If one claiming to be an innocent purchaser should be permitted to interpose that doctrine in such Indian

matters, he would thereby be possessed with a legal right conclusive within itself, both against the restricted Indian and against these Acts of Congress and in turn become more powerful in such matters than the court itself, which is forbidden under such acts to allow any rule of estoppel to be made that would defeat the invalidity of the violation of such acts.

Thus, it is easy to observe that such a doctrine, like the rule of property and other common law principles, if permitted to prevail in such Indian matters, would defeat every one of these Acts of Congress, and in fact would defeat every act that Congress could prescribe for the protection of its Indian wards and their restricted property. For these reasons we do not believe that the doctrine of innocent purchaser ever has any application whatever in the alienation of these restricted lands of these restricted Indians; or that the same will ever be applied thereto or therein upheld by the courts of the land, where these acts have been violated in procuring previous conveyances by fraud or by any other means or methods not strictly in accordance with provisions of said acts.

As the doctrine of innocent purchaser rests on the ground that the title was made defective because of some wrongful or illegal act had or procured before the conveyance to the innocent purchaser, and as such wrongful or illegal act can neither be ratified nor waived by the restricted Indian or ignored

by the courts, because of these Acts of Congress, it follows as an irresistible conclusion that *there can be no such thing as an innocent purchaser of the restricted lands of a restricted Indian*, not even if the full consideration for the lands has been fully paid before the purchaser had knowledge of the wrong committed, or when, or by whom, it was committed. Such is a legal impossibility if the the intent and policy of Congress, prescribed in the acts, are carried out in the enforcement of such acts. Such acts cannot be obeyed and at the same time be ignored or violated, and an indirect violation thereof, by person or court, is as much a violation thereof as a direct violation and is as fatal to the spirit, intent and policy of the acts. Hence, no such plea or other defense should ever be permitted to defeat such acts, and thereby the intent and purpose of Congress in passing them.

Government Still Has Jurisdiction, After a Fraudulent Deed, the Same as Before.

In this connection, and on this feature of the case, the case of *United States v. Waller*, 243 U. S. 452, 61 L. ed. 843, becomes very interesting and material. This involved land which once belonged to a restricted Indian and was once restricted under an Act of Congress. But subsequently such restrictions were removed under the Acts of Congress as shown in said case. After the restrictions were thus re-

moved and the Indian emancipated from the control of Congress, the Indian was unmercifully defrauded out of his lands and the government brought suit to set aside the fraudulent transaction and to restore the Indian to his lands. But it is there held in effect that the government no longer had control or jurisdiction over the Indian or the lands, because of the removal of these restrictions and the emancipation of the Indian; and, therefore, it could not maintain the suit, as it held no interest in the land or authority over the Indian, and was not under duty of protecting either. In other words, it substantially holds that after the Indian and his restricted lands are no longer under the control or jurisdiction of the government, by reason of the removal of the restrictions, the Indian and the lands are out from under the fatherly care and control of the federal government, and it is powerless either to aid or protect him in the enjoyment of said land.

That being the condition and result, so held in that case, it is easy to be seen, and we believe the conclusion is inevitable, that if a fraudulent deed or approval is obtained among the Five Civilized Tribes in violation of the Acts of Congress pertaining thereto and above mentioned, and the same is held to be simply *voidable*, and not absolutely null and void, that the restrictions thereon would be thereby necessarily removed; for a voidable deed rendered such by fraud and deceit carries with it the legal title and

vests the same in the fraudulent grantee, who in turn may grant the land to an innocent purchaser, who takes the same absolutely free and exempt from the fraud and deceit thus practiced in obtaining the original deed by the fraudulent grantee. This is the *general law* upon that subject; but in the disposition and alienation of these Indian lands under these Indian affairs and Acts of Congress, the general law and common law rules *have no application*, but the same are *governed by the provisions of the acts themselves*. *Missouri, K. & T. Ry. Co. v. Kan. Pac. Ry. Co.*, 97 U. S. 491, 24 L. ed. 1097, where it is said:

“It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfer between private parties. To the validity of such transfers, it must be admitted that there must exist a present power of identification of the land, and that where no such power exists, instruments with words of present grant, are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as in all other cases, to the legislative will.”

This same principle was adhered to and this decision cited by the Supreme Court of the state in *Smith v. Williams*, 190 Pac. 555, relied upon in *Molone v. Wamsley*, 195 Pac. 484.

In *Leavenworth L. & G. R. R. Co. v. United States*, 92 U. S. 733, 2 Otto 733, 23 L. ed. 634, the Supreme Court of the United States held:

“The Act of Congress of March 3, 1863, 12 Stat. at L. 772, is a starting point of this controversy. Upon it, and the treaty with the Osage tribe of Indians, proclaimed January 21, 1867, the appellant rests its claim of title to the land covered by the patents. It is, therefore, of primary importance to ascertain the scope and meaning of that act,” etc.

In *Winona & St. P. R. v. Barney*, 113 U. S. 618, 28 L. ed. 1109, in speaking of the construction of legislative grants, the same court said:

“They are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent, we must look to the condition of the country when the acts were passed, as well as the purpose declared on their face, and read all parts of them together.”

And in *Lau Oew Bew v. United States*, 144 U. S. 47, 36 L. ed. 340, the same court held:

“Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion. *Church of Holy Trinity v. U. S.*, 36 L. ed. 226; *Henderson v. New York, etc.*, 23 L. ed. 543; *U. S. v. Kirby, etc.*, 19 L. ed. 278; *Oats v. First National Bank*, 25 L. ed. 580.”

From these decisions we are told that *the Acts of Congress* and not the general or common law *are to govern* in these conveyances, and not such law as exists between private parties thereto. We are also told that the beginning of such rights is the Acts of Congress, to which alone we must look for the intent of Congress, as disclosed in the acts, and in construing such acts the courts may take into account the condition of the country when the acts were passed as well as the purpose declared on the face of the acts and read them all together, but in doing so we must avoid an unjust or an absurd conclusion. Then, would it not be an unjust and absurd conclusion to say that, by these various Acts of Congress, it thereby intended to protect and safeguard these Indians and their restricted lands from the cunning acumen of the white man, and against their own improvidence, as all the courts have always held was the intent and purpose of Congress, and then to say or to hold that, notwithstanding all this previous express caution and provision made in the acts, that there still existed an easy possibility of thus entirely defeating the intent and purpose of Congress in so restricting said lands, simply by the execution of a fraudulent deed or approval for such land? Such a holding or conclusion would unquestionably be unjust to the Indian, and it does seem to us it would be most absurd, for, to so hold, is but to admit that all these Acts of Congress and their extreme provisions against the alienation of these restricted lands would,

as to such fraudulent deed and approval, be absolute failures, and wholly ineffective to safeguard or protect the Indian. Again, to take such a position is but to hold and admit that the fee simple title to such lands pass under such fraudulent deed or approval, absolutely free of any restrictions thereon, and thus also free and entirely exempt from said Acts of Congress; because a fair construction of section 9, of the Act of 1908 (and evidently the intent of Congress was) that when such a deed otherwise valid was legally approved by County Court the land therein described would be free of such restriction, and pass to the purchaser or grantee thereunder a clear and untrammelled fee simple title to such lands, which thereafter would be subject to taxation and all other civil burdens of the State of Oklahoma, as expressly so provided in section 4, of said Act of 1908.

If a fraudulent deed and approval of such Indian lands could thus relieve such lands of such restrictions, by thus being construed as simply voidable, and not absolutely null and void, or otherwise, then, as such restriction would thus be removed, the lands would pass instantaneously under the jurisdiction of the state and subject to its control and all civil burdens, as so provided in said section 4, and thereby the federal government would lose absolutely the jurisdiction and control over such Indian land, just as was so held in *United States v. Waller, supra*. Therefore, by such means and under such holdings,

instantaneously upon such an approval of such a deed the federal government would lose, and the State of Oklahoma would gain and assume, jurisdiction over both the Indian and such lands, and said lands being thus unrestricted and the government thus having no jurisdiction in the premises, it would thereby be totally disabled to bring suit to recover said lands or to remove said deed and approval as clouds thereon, and the Indian, being thus emancipated and now under the control and the jurisdiction of the state, would be forced to go into a court of equity just like any other citizen in like circumstances, and bring suit to have such deed and approval set aside and removed as clouds upon his title. This he may do regardless of whether such a deed and approval are absolutely void or simply voidable, but if simply voidable, he would be bound to go in the state court and should he ever then succeed in his suit and have the deed and approval cancelled as fraudulent, would his land then again become restricted under and protected by said Acts of Congress? Certainly not; and he would be again free the next day to sell and convey said land free of such restrictions, and this time his deed would not have to be approved, because, the restrictions being removed by the fraudulent transaction, it would not be in the power of any court to again reimpose them thereon, and said Acts of Congress being thus nullified by the fraudulent transaction would not, and could not, again automatically assert themselves,

and being legislative in character, would have to be reimposed, if such could be done, by a subsequent Act of Congress, as it alone has jurisdiction in such Indian matters. Again, the jurisdiction of the state having thus been extended over such lands by this fraudulent transaction, its jurisdiction thereover could not be nullified by a decree of the courts, and the Indian and his lands restored to the jurisdiction of the federal court.

So it is easy to see what a complicated and absurd condition is thus brought about, by holding or decreeing that such a fraudulent deed or approval is simply voidable and not absolutely null and void. But, on the other hand, to hold that such a fraudulent deed or its approval when thus procured by fraud, etc., is absolutely null and void, as so provided in said acts, all of these complications are avoided; for, under such a condition no right, title or estate whatever would, or ever can, be conveyed by such a deed which was absolutely null and void, and the title to such restricted land would therefore remain all the while both before and after such deed or approval vested in the Indian and the restrictions imposed by the act would still remain thereon wholly unremoved afterward the same as before. This is the only tenable or sensible construction that can be given said acts in connection with fraudulent transactions and the only view by which the government can retain its jurisdiction as to such fraudulent transactions,

for the notion that such a fraudulent deed or approval is simply voidable will lead to such an absurd condition and legal result that neither the Indian nor his restricted land can ever be restored to their original condition under the acts, without additional legislation of Congress, if, in fact, Congress would then have the power to restore it, which was held could not be done in *Truskett v. Closser*, 198 Fed. 835.

Again, by reference to section 6, of the Act of Congress approved May 27, 1908, it will be observed that both the federal government and the United States probate attorney therein provided for, may institute suits for and on behalf of these restricted Indians "to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands;" and power is thereby given to prosecute such suits on appeal to final determination, and it was held by the Supreme Court of Oklahoma in *Hickory, et al., v. Campbell, et al.*, 75 Okl. 79, 182 Pac. 233, that the powers of such probate attorneys over such matters in minor estates was superior to the control of the guardian of such minors, and that such appeals could be taken to appellate courts without the appeal bond therein being given, because of this

Act of Congress. Is it reasonable, or for a moment tenable, to hold or even suppose that after Congress by the express provisions of section 6, had given the government and its probate attorneys this power to bring suits for such purposes where said act or any other Act of Congress had been violated, that Congress intended, or ever in the least contemplated when passing these acts, that a fraudulent deed or approval of a restricted Indian for his restricted lands would thus absolutely nullify these acts and this authority to bring such suits to rectify such violations of such acts? Certainly not; and it is just as untenable to hold or to say that such fraudulent deed or approval is simply voidable; for, if so, the legal title would thereby pass to the fraudulent grantee and such restrictions would be removed by the approval of the fraudulent deed, the result of which would be as above stated, and render impotent the federal government and its courts or any other court to protect these full-blood wards of the government in the possession and enjoyment of their restricted lands.

The Constitution of the United States confers plenary power upon Congress over these Indian affairs, and the same was so held in *Lone Wolf v. Hitchcock*, 47 L. ed. 299, and in said constitution and in numerous decisions of the court it has been held that said constitution and the treaties and laws of Congress made in pursuance thereof are the paramount laws of the land, and we have long supposed

that such was the law on all matters comprehended by or under said constitution. But if the fraudulent acts of a restricted Indian respecting his restricted lands, or the fraudulent act or conduct of his grantee in a deed for such land, or a fraudulent approval thereof obtained by fraud, no matter whether practiced by or upon the federal agency in making said approval, can operate to convey the fee simple title and all estate of such restricted lands and to remove the restrictions thereon, and thus take such Indian and his restricted land away from the control and jurisdiction of the federal court by such means, then such fraudulent conduct of the Indian or his grantee or such federal agency are so powerful and comprehensive as to become the paramount law of the land itself. By such conduct, such provisions of the constitution and all of these Acts of Congress are thereby entirely displaced and completely nullified, simply by the fraudulent conduct of the Indian himself in conveying his restricted lands, or by the fraudulent conduct of his grantee or some other person in bringing about such deed, or by the fraudulent conduct of such federal agency to whom Congress has delegated the sovereign power of thus removing the restrictions imposed by said acts, through the approval of such Indian deeds for such restricted Indian lands. In other words, a lone Indian or his grantee or other person, or the federal agency itself, by such fraudulent conduct which violates said acts, can thereby completely

nullify the whole acts and the powers of Congress under the constitution; and by so doing he or they become more powerful than the constitution or Congress itself, and the constitution is simply a myth and Congress a farce, as to these Indians and the protection of their property.

Surely, when our forefathers were framing and adopting the Constitution of the United States and Congress was accepting the authority thereunder and passing these laws for the protection of the Indian from the time of such adoption up to the present hour they did not suppose or even dream that all their labors thus performed were of so little importance, and could be completely nullified by the conduct of an Indian who was not even a citizen of the federal government. We do not believe it even yet, but we do believe that if a full-blood Indian's deed for his restricted land or the approval thereof, conceived and consummated in fraud and in violation of said Acts of Congress is simply voidable and the fraudulent grantee thereunder obtains the title thereto and can thereafter convey the fee simple title to said land free of such fraud and restrictions thus imposed, that the same inevitably amounts to the result, conclusion and legal effect above indicated; and we respectfully submit that no such consequences were ever intended by the framers of the constitution, or by Congress in passing said acts restricting said land and Indians, not

even as to the provisions therein contained or the alienation of such inherited land.

The duty of the federal agency in approving such Indian deeds is well defined by this court in *Lykins v. McGrath*, 184 U. S. 169, 46 L. ed. 486, wherein it was held:

"What was the purpose of imposing a restriction upon the Indian's power of conveyance? Title passed to him by the patent, and but for the restrictions he would have had the full power of alienation the same as any holder of a fee-simple title. The restriction was placed upon his alienation in order that he should not be wronged in any sale he might desire to make; that the consideration should be ample; that he should in fact receive it, and that the conveyance should be subject to no unreasonable conditions or qualifications. It was not to prevent a sale and conveyance, but only to guard against imposition therein."

In *Parker v. Richard*, 250 U. S. 235, 63 L. ed. 954, it is held that death of the allottee referred to in section 9 of the Act of 1908 did not remove the restrictions at all, but simply qualified the same so as to permit such inherited lands to be sold on the conditions therein provided; and in *Goodrum v. Buffalo*, 162 Fed. 817, Justice PHILLIPS, in delivering that opinion, observed:

"It should be understood once for all, that no scheme or device, however ingenious or plausible, concocted by any person, can avail to divest the Indians of the title to their allotted

lands, within the period of limitation prescribed by Congress."

On the former hearing in this case the court held in effect that if the facts alleged were established (which they were on the trial in the court below), the approval of this deed was a nullity. If the approval is a nullity, as so held, that of itself renders the deed also a nullity, for by the express provision of section 9 of the Act of 1908, none of such deeds are valid unless actually approved by the court having jurisdiction of the settlement of the estate of such deceased allottees; and as this approval was thus rendered a nullity there was no approval of this deed at all, as so required in said section: Therefore, said deed and approval conveyed no right, title or interest whatever in the restricted lands involved in this case. Consequently the deed to Sims and all other mesne conveyances thereafter, including the deeds to Kunkel, conveyed no title or estate whatever in the lands, but left the full and complete title thereto vested all the while in Hannah Canard Barnett, where it remains to this good day. Hence, neither Kunkel nor the Prairie Oil and Gas Company acquired any right or interest in said lands and *are not innocent purchasers.*

At the close of paragraph ten of appellants' amended cross complaint, found in the record, it is alleged in substance that at the time of taking said deed to said Sims on March 22, 1909, or at any time

thereafter, it was not the intention or purpose of either said Sims or Hannah Canard Barnett to have said deed approved by the County Court of Okfuskee County. This allegation is not specifically denied, but even if it were, that fact is established by the record, for it is shown by the record that no attempt whatever was made to have said deed approved by the County Court of said Okfuskee County until more than four years after the date of the deed, and even then what was done was not at the instance or request of Sims or Hannah Canard Barnett, but by R. S. Litchfield, who alone was then interested in obtaining such approval. This fact is further shown from the fact that as soon as Hannah Canard Barnett found that there was such a deed on record she at once employed Crump to bring suit to have the same removed as a cloud upon her title to said lands and the lands quieted in her, and such a suit was brought on the 31st of March, 1913, for such purpose. If, at the time of taking said deed on March 22, 1909, there was no intention on the part of Hannah or Sims to have the same approved by the County Court of Okfuskee County, then said deed was taken and attempted to be held in open violation of, and contrary to, said Acts of Congress and particularly section 9 of said Act of 1908; and the same was therefore simply an attempted alienation by deed, and not an alienation at all, and was executed before the removal of restrictions from said lands, and was therefore taken in the very teeth of the

prohibitions contained in section 5 of said act, and was therefore "*absolutely null and void*," as so declared in said section. This again nullifies said deed, whereby no title whatever to said lands ever vested in said Sims and the title thereto was not divested from said Hannah Canard Barnett; and the whole transaction thus utterly failed and left Hannah Canard Barnett as the owner of the fee simple title to said land ever thereafter.

But, had it been the intent and purpose of both Sims and Hannah Canard Barnett that said deed should be approved by the proper County Court, and the approval thereof by the County Court of Okfuskee County had actually been obtained, in the way and manner disclosed in the record of this case, still, in our opinion, such an approval was fraudulent, and the court rightfully so held it to be a nullity.

Badges of Fraud Shown in Record.

What are the badges of fraud disclosed by this record? We find from it that on the 26th day of May, 1913, Crump executed this contract and quitclaim deed to Litchfield after thus instituting said suit in the District Court of Creek County on March 31, 1913; that by said contract and quitclaim deed both Crump and Litchfield openly violated the terms, provisions and conditions made and embraced in the contract and lease given to Crump by Hannah Canard Barnett, whereby he was thus employed by her

as her counsel in said case, and whereby said suit was not to be compromised, settled, etc., without the approval of the County Court of Okfuskee County, which was never obtained, and whereby the terms and provisions thereof were binding upon said parties thereto, their heirs and assigns; that on the same date, to-wit, May 26, 1913, as evidenced by the alleged petition for such approval signed by Crump & Skinner and notation of Crump on the back thereof asking for such approval, Crump was at the town of Weleetka and soliciting Hannah Canard Barnett to release him from said contract of employment and offering to pay her therefor \$2,000.00, and at the same time, in order to induce her to take the same and so release him, he was representing to her that there was a possible chance to gain said suit, but it would take a long time, and he could not attend to it, or words to that effect, when in truth and in fact he never paid the \$2,000.00, and said suit was so easy and simple in its nature and character as the case then existed without any legal approval whatever of said deed, that there was no way to defeat it, and neither Sims, Litchfield nor anyone else at that time had any vested right, title or interest in the land, and it was only a matter of waiting until said case was reached on the docket that it could have been then finally decided in favor of Hannah Canard Barnett, without any possible chance of being defeated, as shown by the decision of this court in *Bartlett v. Okla Oil Company*, 236

Fed. 488, and by the express provisions of section 9 of the Act of 1908, as Mahaley Watson died in October or November, 1908, and then lived with her mother in Okfuskee County, the geographical bounds of which had been fixed in the constitution of said state for more than a year before the death of this child, and the residence and abode of said child and mother had been in said county and confines thereof for many years; that such representations thus made to Hannah Canard Barnett were false and untrue and evidently so made as a means of getting her before the County Court of Okfuskee County and thereby an alleged approval by it of said deed, without the knowledge or consent of Hannah Canard Barnett; that in evidence thereof she was taken to Okemah, the county seat of said county, by said Wallace on the same day, but not being able to see Judge Smith on that occasion, she was taken back on the 17th of June, 1913, at which time she saw Judge Smith at his home, and Wallace handed him a check or draft for \$2,000.00, made payable to Hannah, and Smith handed it to her, at which time and at the time she had said conversation with Crump, she testified that nothing whatever was said to her or in her presence so far as she knew about either approving said deed to said Sims or dismissing or compromising said suit; that Patterson was likewise there with a check of \$2,000.00 payable to said Crump, both of which checks were shown to Judge Smith to induce him, as stated in her cross

complaint, to believe that said deed was to be approved on an additional consideration of \$2,000.00 to Hannah and an equal amount to Crump, represented by said checks; that also in violation of his contract of employment, said Crump entered into said contract in said suit with counsel of said Litchfield, whereby said suit was to be dismissed with prejudice and the title to said land quieted in said Litchfield, instead of in Hannah Canard Barnett, as expressly provided in said contract of employment, and had said decrees of said court entered up by said court in accordance with said contract, all of which was in open violation and contrary to said contract of employment; that in said matters said Crump received the sum of \$5,000.00 and perhaps the \$2,000.00 check in addition, of all of which said Hannah Canard Barnett had no knowledge and to which she never consented, as shown by her testimony in this case; that whatever she did on said occasion was under the advice and direction of her counsel, Crump, who at that time was secretly making these contracts with Litchfield and his counsel and thereby settling said suit, and at the same time was, as shown by said petition for approval and notation thereon, trying to procure the approval of said deed by the County Court of Okfuskee County, which was to the extreme detriment and prejudice of his client, Hannah Canard Barnett, and which in fact has caused this whole subsequent litigation; that said alleged approval, if ever made, was brought

about in this deceptive manner and without the knowledge or consent of Hannah Canard Barnett, and by the active participation of her counsel whose duty under his contract of employment was to have defeated the same and to have prosecuted said suit to final termination, which would have easily recovered the land for his client had he done so; but instead of following and complying with his contract of employment he thereby openly violated it and went over to dealing with the opposite side and received therefrom the vast sum of \$5,000.00 or \$7,000.00, no part of which was ever given to or received by his client, Hannah Canard Barnett, and she had no knowledge of the same ever having taken place, as shown by her testimony. If this was not infidelity, it would be hard to conceive what that word means or what it would take to constitute infidelity between attorney and client; yet, this was the means resorted to to obtain said approval, and by which it was obtained, if in fact obtained at all, and that without the knowledge or consent of Hannah Canard Barnett.

But to this it may be said that she swore to said petition and that Patterson undertook to testify that it was explained to her by Judge Smith and that she understood it. But his testimony discloses that as he could not understand Creek and she could not understand English, and simply answered "uh huh" to what was said to her—it is too evident that

she did not understand what was said or going on at that time, as she so testified. Patterson also said that McDermott interpreted on said occasion, but McDermott was not called by appellees to contradict her statement or to show that she did understand that said deed was thus to be approved by said court, although said McDermott was present in court on the trial of this case, but that is not shown in the record. Neither was Sims called to show that the deed was to be approved by said County Court when taken or that said approval was obtained at his request. Neither was Crump, Skinner nor Wallace called by appellees to deny the testimony of Hannah Canard Barnett or to explain any of said matters or to show that she knew said deed was thus to be approved by said court; yet, such conduct was charged as fraudulent and specifically set out in the amended cross complaint of appellants, whereby the appellees had full and timely notice it would be relied upon and ample time to disprove it if they could. But they failed to make any such defense or give any attention thereto, seemingly relying wholly upon the idea that they had safely anchored under the doctrine of being innocent purchasers, and were safe at rest in the harbor of peace.

In this case great importance should be given to the fact that the appellants are Creek Indians, and that Hannah Canard Barnett, the only one interested in the case, cannot speak or understand the English language and cannot understand a conver-

sation in that language, as she so testifies; that she is illiterate and wholly incompetent to understand business transactions or the value of property, as set forth in her cross complaint and shown in her testimony. This fact alone was regarded by this court as of grave importance sufficient to be mentioned and referred to in its decision in *United States v. Noble*, 237 U. S. 734, 59 L. ed. 844, and in *Felix v. Patrick*, 145 U. S. 317, 36 L. ed. 726, where the Supreme Court of the United States observed:

“We fully coincide with what was said by Justice DAVIS in the case of *The Kansas Indians*, 72 U. S. 5 Wall. 753, that ‘*the conduct of Indians is not to be measured by the same standard which we apply to the conduct of other people*’.”

In *Jones v. Mehan*, 175 U. S. 1, 44 L. ed. 62, the Indian heir had by affidavit shown that all the children were heirs, but afterward contended that he alone was the sole heir, and was held so to be, the Secretary overlooking this inconsistency in his claims because of the fact that he was an illiterate Indian and perhaps not versed in such matters.

In *Hickory v. Campbell*, 182 Pac. 233, point 9, it was held by the Supreme Court of Oklahoma that:

“the watchfulness and vigilance of a court should be quickened when dealing with an estate of full-blood Indians, whose knowledge of the English language may be totally lacking or deficient and whose timidity to appear in

court is well known and whose experience in the affairs of life has been limited.”

In short, as said by Justice DAVIS, in *The Kansas Indians*, “the conduct of Indians is not to be measured by the same standard which we apply to the conduct of other people,” and therefore their testimony should not be scrutinized or applied with the same exactness as members of a higher civilization.

In *Georgia v. Worcester*, *supra*, it was held by Chief Justice MARSHALL that Indian treaties should be construed in the way and manner most likely understood by the Indian; and in the same case Justice McLEAN held that such treaty should never be construed to their prejudice; and in *Jones v. Mehan*, *supra*, this court held that Indian treaties should be construed in the way they would most likely be understood by them, and not as they would appear to learned lawyers.

There is no valid reason why the rules thus laid down should not also be applied to the construction of contracts made with Indians, and especially where the Indian is illiterate and unable to either speak or understand the English language, in which contracts are written and which is used in negotiating the same. Such an Indian is at a woeful disadvantage and is obliged to rely upon interpreters, whose fidelity is not always of the highest order, or ability to interpret the most scrupulous or proficient.

Hence, it is an easy matter for such an Indian to be misdirected and wholly misunderstand the transactions and thereby greatly defrauded and imposed upon. In all such Indian matters courts ought to take these conditions into consideration and construe such contracts in the way and manner the Indian most likely understood them and should never construe the same to their prejudice, unless the evidence and the surrounding circumstances are clearly against them.

In the case at bar, Hannah Canard Barnett was always alone, without a friend on whom she could depend to testify in her behalf, but was surrounded by these parties whose object and purpose evidently seems to have been to procure the title to her lands, even to the extent of trying to procure the approval of said deed by said County Court of said Okfuskee County, without her knowledge or consent, all the while leading her to believe that the money she was to receive upon such occasion was being paid by her own counsel to be relieved from his contract of employment, and which she did believe and acted upon, as shown by her testimony in this case. It is true that her husband, Tucker Barnett, was present. But under the laws of Oklahoma a husband or wife cannot testify for or against each other in civil matters, unless the one is acting as the agent of the other, etc., and for this reason Tucker Barnett was not called as a witness for the appellants, as he was not competent under the law to testify in her behalf. In

none of these transactions was he her agent or attended to such matters for her. Hence he could not testify. By careful consideration of her testimony and taking into account her illiterate condition, and applying the rules thus laid down by the courts above indicated, it is clear beyond doubt that Hannah Canard Barnett never knew as she so testified that her suit or her rights to said lands were being settled or compromised or that said deed to said Sims was to be approved by the County Court of Okfuskee County; and it is equally clear therefrom that what was done on said occasion to procure such approval, compromise and settlement of said case, was all concealed from her, and was so procured without her knowledge or consent; and with the fixed belief all the while and thereafter that the \$2,000.00 she received had come from her own counsel as consideration for being released from his contract of employment. Then should such matters be permitted to stand in a court of equity and she be thereby compelled to lose the allotment of her deceased child which she so fondly cherished, and never intended to sell or convey?

It should not be overlooked that it was the allotment of her deceased father, Hully Canard, which she sold and supposed she was conveying, not to Sims, but to Lake Moore; and when she found this deed on record for her child's allotment she at once employed Crump to recover it, in the way and manner disclosed in this record. She so testified, and no

one has denied it, although appellees were full-handed with proof to the contrary if such was not true, for they could have easily called C. W. Miller, who purports to have taken the acknowledgments, and Judge Gardner, who undertook to approve said deed on the day it purports to have been taken. They could also have called the witnesses to said deed and the one who interpreted on that date in the procurement of said deed and approval, for as she could neither speak nor understand the English language it was absolutely necessary in all such matters to have an interpreter. But none of these witnesses were called, and the presumption of law is, in their absence, that had they been called their testimony would have been against the appellees and in favor of the appellants.

Is the Presence, Participation or Knowledge and Consent of a Full-Blood Indian Grantor Necessary to the Approval of His Deed for His Restricted Lands?

The trial judge seems to have been imbued with the notion that such was not necessary at all and that such a deed could be approved at the instance of any person interested, without the knowledge or consent of the Indian grantor, for, on page 106 of the record, Hannah Canard Barnett is asked "Did you go before the county judge?" But was not allowed to answer, as the trial court observed:

"She did not have to, the way I understand the law. I do not understand the law to require her to go before the County Court. Anybody in interest could take the deed and get it approved."

Then again, on page 111 of the record, the trial court observed:

"When there was an approval before the county judge—when it was approved by the County Court—under the decision of the Eighth Circuit Court of Appeals, that carried the title. She did not have to appear;"

and again on the same page:

"That would only apply as to the settlement of that lawsuit, but if this deed, when it was approved to Sims when it was approved in Okfuskee County, that vested the title."

From these remarks of the court we are lead to the belief that on the trial of this case it was the theory of the trial court that it was not necessary for Hannah Canard Barnett to go before the County Court of Okfuskee County for such approval or to have any knowledge thereof or consent thereto; that anyone interested could procure such an approval, and when obtained it would vest the title; and that such was the decision of same Circuit Court of Appeals. In the first place, said court did not so hold, but did hold that, *"if the charge was substantiated, the approval of the deed was a nullity,"* as shown on page 400 of 259 Federal.

As to said approval, the charges in the original cross complaint were substantially the same as in this amended cross complaint of the appellants, and we respectfully submit that such charges have been fully established by the testimony on the trial in this case. Hence, the charges we believe have been "*substantiated*," and said approval is thereby shown to be "*a nullity*". If it is a nullity, then it is too evident for dispute or contradiction that the title to the lands did not vest at all, as was supposed by the trial judge; for, being a nullity, it could have no legal force or effect whatever, and was not a compliance with the requirement of section 9 of the Act of Congress approved May 27, 1908, which expressly provides that such a deed shall not be "*valid*" unless it is approved by the County Court having jurisdiction of the estate of the deceased allottee, which, in the case at bar, was the County Court of Okfuskee County. Hence, there being no valid approval, the deed itself was not "*valid*," as therein declared. Hence, no title whatever has ever vested under said deed, as the same has never been legally approved as required by said section. Hence, the trial judge was in error as to the nature of the decision of said court when this case was formerly before it.

Next, is the theory of the trial judge correct, in holding that it was not necessary for Hannah Canard Barnett to go before said County Court for such approval, or have knowledge thereof and con-

sent thereto, and that any person in interest can have such an Indian deed approved by such courts? If that theory be true, then there was a great deal of love's labor lost in the effort of Crump, Litchfield and others to get Hannah Canard Barnett before said County Court, and apparently, at least, aiding and participating in the approval of said deed, shown by the record in this case; if all that was necessary to procure a valid approval thereof was simply for Litchfield or someone else interested in said land to go before said County Court and procure such an approval, and thereby the title to such land would become perfect in such person, and Hannah Canard Barnett would have been divested of all her rights and title thereto, even though she at that time had a suit pending for the purpose of canceling said deed and removing the same as a cloud upon her title and quieting the title thereto in herself. We do not believe in any such a theory, or that a valid approval of such an Indian deed can be obtained under these Acts of Congress without the knowledge, consent and participation of the Indian grantor; for, it is a known fact that practically all the inherited lands in Eastern Oklahoma are plastered over with numerous deeds of Indians, taken in the very teeth of these acts, and absolutely void when so taken, not only because in violation of said acts, but often so given by those who are not heirs at all to the lands thus attempted to be conveyed, and procured by undue and unfair means. If

it has now come to pass that all that is now necessary to perfect said deeds by such an approval and thereby vest the title to such lands, without the knowledge, consent or participation of such Indian grantors in obtaining such approvals, Poor Lo is, indeed, in a very bad plight as to his inherited lands, or lands from which restrictions have been removed. Under such circumstances, every Act of Congress and the intent and purpose of Congress thereby expressed, would be utterly defeated and rendered nugatory from the beginning; for, if a deed for such restricted lands, absolutely void when taken because in violation of said acts or for fraud or deception, etc., can afterward be purged of its illegality by such an approval, then these acts are thereby rendered futile and absolutely worthless.

It is true that section 9 of the Act of 1908 does not prescribe the procedure to be followed in the approval of such deeds, but it does expressly provide that such approval must be made by the court having jurisdiction of the settlement of the estate of said deceased allottee; and as the approval, if made at all, must be made by the "*court*," this by necessary implication provides that there has to be presented to it some written instrument by which the facts are brought before it, for courts act upon such pleadings, and speak only by and through their records. Hence, the approval must likewise be in writing and therefore have a physical existence and be signed by the court, and when so made, that ap-

proval, and it alone, becomes the sole and only evidence of the approval of such a deed. This approval must likewise be made after the execution of the deed it approves, for section 9 itself contemplates that the deed must be in existence in order to be approved. Hence, the deed must first be executed and, of course, should be before the court for its physical inspection before the court could legally approve the same, because it is there provided that such a deed shall not be valid unless so approved. It therefore follows that there must be both a valid deed and a valid approval to pass the title to said land; and, as the Indian is thereby to be divested of his title to such lands, it is far more important to the valid approval of his deed that he be present and have knowledge of such matters, than anyone else; and it is imperatively necessary for the court to know the whole facts in the case in order to legally perform the duties thus imposed upon it in the approval of such deeds. Hence, the necessity of the presence and assent of the Indian grantor in such approval.

It will be observed that the provisions and conditions provided for in said section 9 are not the same or similar to the Act of Congress involved in the case of *Lomax v. Pickering*, where it was only necessary to have the consent of the President for the alienation of such Indian lands. There it was held that such consent could be given either before or after the execution of the deed, but would be

better if given afterward. But, under section 9, there can be no approval of such a deed until the deed is in existence. It is the deed under said section that has to be approved, whereas under said other act all that was necessary was to have the *consent* of the President, which consent could be given either before or afterward. Hence, the *Lomax* decision has no application to this feature under section 9.

From the quotation above given from *Lykins v. McGrath*, it will be seen that in the approval of an Indian deed the federal agency is charged with the proper performance of certain duties there prescribed. The *first* of these duties is for it to determine that the Indian grantor would not be wronged in any sale he might desire to make; *second*, that the consideration for such lands should be ample; *third*, that the Indian actually received that consideration; and, *fourth*, that the conveyance should be subject to no unreasonable conditions or qualifications.

Here are defined at least these four solemn duties which the federal agency is bound to legally perform under his solemn oath or the solemnity of his office. This gives him no power or authority to illegally perform these duties or to approve an illegal deed. *Jackson v. Brown*, 15 Johns. 264; nor will it permit such an approval *pro forma*; for these duties impose the exercise of a powerful discretion of such agency whether such a deed should, or should not, be approved; and in such approval the agency

can take nothing from nor add anything to such a deed, according to its terms and provisions. *Midland Oil Company v. Turner*, 179 Fed. 75; *Wood v. Jennings*, 192 Fed. ... These duties are imperative and therefore of necessity require an honest determination of the matters thus required on behalf of the Indian grantor, as such an agency *owes no duty whatever to the grantee and performs none for him*, but acts alone *for and on behalf of the incompetent Indian*. It is absolutely necessary in order to a proper and legal performance of such duties that the Indian grantor be brought before such tribunal in person and be by it interrogated and his physical and mental condition ascertained and determined, as well as his habits of life and his likely disposition to be bettered, and not worsted, by the sale and conveyance of his lands. It might well be that the consideration for the lands would be ample but at the same time to permit said lands to be sold even for such ample consideration, would greatly wrong the Indian, his estate and family, in case he was thriftless, drunken or prone to the dissipation of his property. In which case it would be the solemn duty of such tribunal to refuse to approve such deed. Again, if the consideration was not ample, or if the deed was, or was likely to be, hampered by unreasonable conditions or qualifications, it again would be the duty of the court to refuse the approval; and under all conditions it would be the duty of the tribunal to see to it that the Indian ac-

tually received a consideration for the lands which was *ample*.

How can such solemn duties be performed as required in this act without the presence of the Indian grantor, who in such cases should be present for the inspection and examination of the court at least to determine his personal qualification or disqualification in such matters? As these duties are thus imposed for and on behalf of the Indian grantor, and not the grantee, the Indian grantor becomes a party in interest in such matters of approvals and should take the initiative by presenting his written petition to such agency for such purposes. This and this alone gives to the agency its jurisdiction therein and we respectfully submit that without such a petition thus initiated and presented by the party alone in interest, such a tribunal would not, and could not, acquire jurisdiction to make such an approval.

It must not be overlooked that under section 9 it is the *court* that must perform these duties; and in order to acquire jurisdiction that court in such matters—the same as in all other judicial matters—must have a written pleading to invoke its jurisdiction in that particular matter, and upon which to act; and the same must be presented by the party in interest, and who is to be relieved or affected thereby. This is the Indian grantor. It is true, it might be said that his grantee was likewise interested in getting his title perfected by such an approval.

But section 9 of said act was not provided by Congress for his benefit or protection, but was for the benefit and protection of the Indian ward, for whom alone it was legislating. Hence, to obtain the relief and results provided for in said section, the Indian grantor must by necessary implication arising out of such provisions, take this initiative and such approvals must be had with his knowledge and consent. We respectfully submit that such duties cannot be properly and legally performed in accordance with the decision of this court in *Lykins v. McGrath*, and the letter and spirit expressed in said section, without the actual presence of the Indian grantor before such court when approving such deeds.

The approval of such an Indian deed is more alike and similar to the acknowledgment of a deed of a married woman for her separate property, where she is required to be examined privily and apart, than anything else we can think of. In those cases as to such property married women are *non sui juris*, and cannot convey their separate property at all except strictly in accordance with the statutes that permit such conveyance, and then the certificate of acknowledgment must show on its face that every requirement of the statute has been strictly complied with. Otherwise the title to her land will not be conveyed and both deed and acknowledgment will be utterly void, as may be seen from the following decisions:

- Hitz v. Jinks*, 123 U. S. 286, 31 L. ed. 156;
Drury v. Foster, 69 U. S. 17;
Young v. Duvall, 109 U. S. 573, 27 L. ed. 1036, 1038;
Comegys v. Clark, 44 Md. 108;
Jamison v. Jamison, 3 Whart. 457;
Williams v. Baker, 71 Pa. 476;
Harkins v. Forsyth, 11 Leigh. 294;
Green v. Godfrey, 44 Me. 25;
Baldwin v. Snowdon, 11 Ohio St. 203;
Graham v. Anderson, 42 Ill. 514;
Dolph v. Barney, 5 Oreg. 191;
Johnson v. Wallace, 53 Miss. 331;
Harkley v. Frosh, 6 Tex. 208;
Central Land Co. v. Laidley, 32 W. Va. 134,
9 S. E. 61, 3 L. R. A. 826, 25 Am. St. R. 797;
Hanley v. Nat. Loan Co., 44 W. Va. 450;
Cecil v. Clark, Id., 659;
Harvey v. Peck, 1 Munf. 518;
Hartshorn v. Randolph, 12 Leigh. 495;
Grove v. Zumbreo, 14 Gratt. 501;
Little v. Dodge, 32 Ark. 453;
Wentworth v. Clark, 33 Ark. 432;
McGehee v. McKenzie, 43 Ark. 156;
Jones v. Freed, 42 Ark. 397.

Perhaps the most noted of these cases is *Central Land Co. v. Laidley*, which was taken to the Supreme Court of West Virginia three times and each time the acknowledgment of the married wom-

an was held void and that no title passed thereunder. It was then taken to this court and dismissed for want of jurisdiction.

From these decisions it will be seen that a married woman in the conveyance of her separate real estate, must appear in person before the officer who is to take her acknowledgment; and she must then be examined by said officer privily and apart from her husband, when and where she must make certain declarations or acknowledgments provided in the statutes, and in case any material fact is omitted from the face of the certificate of the officer, it invalidates the deed and certificate and no title whatever passes; nor can such certificate afterward be corrected or amended by the officer or anyone else. Under such laws, who would for a moment suppose that the married woman did not have to appear in person before such officer, or that such an officer could take her acknowledgment to such a deed without her knowledge or consent? Such a position would be perfectly absurd; and if such a thing was undertaken without her presence, her knowledge or consent, there is no question but that the same would be utterly null and void and pass no title whatever to her separate real estate. Such a full-blood Indian heir is likewise *non sui juris*, and made so under these Acts of Congress, the same as such married women are made *non sui juris* under such state statutes. In both cases they are prohibited from

alienating their lands except strictly in accordance with the laws permitting it, whether those laws be state or federal.

We, therefore, see no sound reason for the notion that an Indian's deed for his restricted land can be approved without his presence and without his knowledge and consent; and especially where such an Indian was opposed to selling his restricted lands or the approval of such deed, as we know to be the case in the case at bar. Hannah Canard Barnett had employed Crump to bring this suit to recover her land, cancel this deed and quiet the title in her, and the suit had been brought and was pending at the very time this alleged approval is claimed to have been made by the County Court of Okfuskee County, and she testified that she did not know at that time that it was intended the suit should be compromised, and was not informed of any attempt to have said deed thus approved. The very concealment of these facts from her, and at the same time getting her before Judge Smith and handing her this check for the \$2,000.00, impresses us very much as not only a fraud upon her, but likewise as a collusion by and among the parties engaged therein in order to thus bring about this alleged approval without her knowledge, and without the knowledge of Judge Smith as to what was actually going on.

The act of the state legislature above referred to provided for all of these things and even for compul-

sory process to bring such Indian grantors before such County Court on the occasion of such approval; but that act was set aside by the decision of the state Supreme Court in *Molone v. Wamsley*, 195 Pac. 484, as above referred to. But, notwithstanding, we believe all such matters arise under section 9 of said Act of 1908, by necessary implication arising out of the provisions thereof, except, perhaps, a compulsory attendance of such Indian. But as such approvals are all left with the discretion of said County Courts, they themselves are not compelled to act if for any reason they see proper not to do so; and as no appeal from their action is provided in said section or Act of Congress their actions are final, and cannot be assailed except for fraud or want of jurisdiction, as decided in other matters by this court in *United States v. California O. & Land Co.*, 37 L. ed. 354.

In the case at bar we assail the alleged approval of the County Court of Okfuskee County on the grounds, *first*, that such an approval as was presented in this case was not the approval of said court at all, for reasons heretofore assigned; *second*, that fraud was practiced in its procurement, as also heretofore assigned; and, *third*, that said court therefore had no jurisdiction to make the alleged pretended approval dated 17th of June, 1913, for reasons assigned.

For additional decisions upon such grounds of fraud, and especially as to the conduct of Crump as

counsel for Hannah Canard Barnett, we cite the following decisions and authorities:

Wheeler v. Smith, 9 How. 55, 13 L. ed. 44;
United States v. Throckmorton, 25 L. ed. 96;

Baker v. Humphrey, 25 L. ed. 1065;
In re O'Brien Estate, 19th N. W. Rep. 651;
Stockton v. Ford, 11 How. 233, 13 L. ed. 682;

Goringer v. Palmer, 126 Fed., page 915;
Valentine v. Stewart, et al., 15 Cal. 387;
Pacific Railroad Co. v. Mo. Pac. R. R. Co.,
28 L. ed. 502;

Graffam v. Burgess, 117 U. S. 108, 29 L. ed. 839;

Estudilla, et al., v. Scantya Co., 87 Pac. 19;
Johnson v. Waters, 111 U. S. 640, 28 L. ed. 547;

Burt v. Gotzian & Co., 102 Fed. 537;
Russell v. Southard, 12 How. 139, 13 L. ed. 927.

And, on the subject of fraud and unconscionable transactions, we refer to the following authorities and decisions:

Lamerson v. Johnson, 24 Am. St. Rep. 410,
near top of page 411;

Mitchell v. Zimmerman, 51 Am. Dec., at
top of page 720;

Story's Equity Jur., Secs. 198, 199;
Kent Com., 487;

Shock v. Fish, 144 Pac. 584;

Briscoe v. Bronaugh, 46 Am. Dec., at page 117;

Jazan v. Toulmin, 44 Am. Dec. 448;

Campbell v. Dick, 172 Pac., at page 785;

Bruner v. Cobb, 37 Okl. 228;

Lynn v. Wright, 18 Tex. 337;

Burch v. Smith, 15 Tex. 219, 65 Am. Dec. 154; note at page 158;

Bryant v. Simmoneau, 51 Ill. 324, at 327;

Parker v. Stafford, et al., 48 Fla. 290, at page 295;

Kemper v. Dooley, 60 Ark. 526, at page 531.

The objections of the appellants to said purported order of approval and the introduction of the purported copy thereof in evidence in this case, can be seen from pages 72 to 75 of the record, where they appear specifically set out in paragraphs. But the same were overruled and the copy allowed to be introduced in evidence, to which appellants excepted, as shown on page 76 and again on pages 77 and 78, as to the introduction of the book containing said alleged entry and thereafter.

As it is a part of the theory of the appellants that said Kunkle and Prairie Oil and Gas Company were not, and in this case could not be, innocent purchasers, we objected to all evidence, proof or testimony thus offered by them tending to show such matters, as will be seen from the beginning to the end of this trial from the record thereof; but such

objections were overruled and exceptions thereto were saved, as shown by the record. We respectfully submit that such testimony was not competent under the law and the facts in this case; that the court erred in overruling such objections, and that there was no competent evidence in this case showing there had been a valid approval of said deed or that the appellees were innocent purchasers, and that under the law that governs these Indian matters, they could not in law or fact be innocent purchasers of the land, and therefore they obtain nothing under the deeds and lease under which they claim.

Discussion of the Assignments of Error.

First Assignment.

This is that the court erred in admitting in evidence this purported deed of Hannah Canard Barnett to Sims, dated March 22, 1909. This feature and in fact all others embraced in the assignments of error, except the fourteenth, have already been discussed in a general way in the preceding part of this brief, and for that reason but little will be said as to each assignment, as it would necessarily be simply a repetition. This deed was not admissible in evidence at all, because it purports to be a warranty deed, which she could not make at that time, if, in fact, a full-blood Indian can ever make a warranty deed for his restricted lands. They sell only through the provision of Congress, and then only

whatever Congress thus permits to be sold. No personal obligation of such Indians follow the execution of such a deed, for they are liable for nothing for a breach of a covenant in such deeds, and the force and effect of the deed is measured by the license given in these acts to sell the same—and nothing more. The deed purports to convey the fee simple title, both legal and equitable; and it is apparent that at that time she could not convey, for she did not then have the legal title thereto. She was therefore legally incompetent to make such a deed, and the deed was therefore void for want of legal capacity to make it. Hence, it was incompetent as evidence and should have been rejected, and the court erred in admitting it. *Libby v. Clark*, 30 L. ed. 133; and would not convey after-acquired title. *Monson v. Simonson*, 58 L. ed. 260; *Franklin v. Lynch, et al.*, 58 L. ed. 954; *Bartlett v. Okla Oil Co.*, 236 Fed. 488, and other cases heretofore cited; nor would the same convey a lesser interest in said lands even if she then owned the same, as the deed itself purports not to convey a lesser but a greater interest and title in said lands than she then held; and said deed was absolutely void under section 5 of the Act of 1908, and conveyed nothing, and therefore was not competent evidence of any conveyance at all.

Second Assignment.

This pertains to the purported order of approval, and it was attempted to be shown that said

deed was approved simply by a copy of an entry made in a book kept by the clerk, and not by the original order made by the court, and without showing, claiming or establishing that the approval itself was lost and could not be found; *second*, that such approval was signed only by the judge of said court at his home, and was not made by the County Court of said Okfuskee County; *third*, the same, if in fact made, was procured by fraud and collusion, and was therefore a nullity and had no probative force or effect, and was totally incompetent as evidence in the case; and, *fourth*, said deed being void, said approval was likewise void for that reason alone, and again was not competent even had it been regular in form and made by said County Court, all of which have been fully presented.

Third and Fourth Assignments.

The third pertains to page 391 of a book known as Land Approval Fee Record No. 1; and the fourth pertains to pages 384 and 385 of the so-called Record of Approval of Indian Lands No. 2. These pages were of course incompetent to be read in evidence, for the reason that they are not legal evidence within themselves, as there is no law requiring or whereby such approval business must or can be recorded, and the same do not come within the provisions and consequences of section 5099, pertaining to the recordation of instruments required by law to be recorded. And, there being no law requir-

ing any such books or records therein, the entries so made are simply void and incompetent as evidence and establish nothing.

Fifth Assignment.

This pertains to the stipulation of counsel that these mesne conveyances had been executed and delivered, but that would not entitle them to be introduced on behalf of the appellees to show their title to said lands; for, said deed and approval being void, such subsequent deed was likewise void and conveyed nothing, and therefore wholly incompetent as evidence of anything. Besides, all of them except the deeds to Kunkel were executed prior to the 17th of June, 1913, at a time when under any aspect of this case the title to said land was unquestionably in Hannah Canard Barnett, as the title thereto could not be conveyed except through a deed valid in form and then legally approved, as required by this Act of Congress, which had not been done when said mesne conveyances were so executed. Hence, they were clearly incompetent as evidence.

Sixth Assignment.

This pertained to this special warranty deed of May 8, 1914, by Litchfield and others to Kunkel upon the lands involved. This deed was itself illegal and purports to have conveyed a greater interest in said lands than said Litchfield and others then owned, as the legal title had never left Hannah Ca-

nard Barnett, and was not, and could not have been, conveyed under said deed had the same legally been approved on the 17th day of June, 1913, and therefore such deed thus offered in evidence was clearly not competent in law to establish the character of title it purports to convey. Besides, said alleged approval having been procured by fraud, was itself a nullity, and did not operate as an approval of said Sims' deed under section 9 of said act; and therefore said special warranty deed conveyed nothing and was no evidence whatever to the title of Kunkel to said lands; but was absolutely null and void, for the reasons applicable to the five preceding assignments.

Seventh Assignment.

This pertains to the purported warranty deed of Litchfield and others to Kunkel, dated the 12th day of May, 1914, the same being incompetent for the same reasons applicable to the Sixth Assignment; and the further reason that it conveyed nothing more than said deed of May 6, 1914, except it purports to warrant the title to such lands without any additional consideration, as shown by the testimony of Kunkel; and for such reasons, the same was absolutely null and void and conveyed nothing, as against Hannah Canard Barnett.

Eighth Assignment.

This pertains to the oil and gas lease purporting to have been given by Kunkel to the Prairie Oil

and Gas Company, which was null and void upon the grounds and for the reasons applicable to the seven preceding assignments and the instruments involved therein, and was therefore absolutely null and void under said Acts of Congress for said reasons, and for the further reason that the same was not given by Hannah Canard Barnett, nor was the same ever approved by the Secretary of the Interior, as provided in section 2 of said Act of May 27, 1908, and was made in open violation of said act and was therefore absolutely null and void, as declared in section 5 of said act.

Ninth Assignment.

This is that the court erred in holding and deciding that the purported order of the County Judge of Okfuskee County, approving said deed from Hannah Canard to B. O. Sims, was a valid order and a valid and sufficient approval of said deed. This we respectfully submit was a plain, palpable error, and fatal to every claim of the appellees to any interest in said land, *1st*, because the evidence conclusively shows that if any such an approval was ever made it was made by the county judge and not by the County Court of Okfuskee County, and therefore was absolutely void for want of jurisdiction in said judge to make the same; *2nd*, that the only legal power, authority or jurisdiction extant for the approval of such Indian deeds is vested alone in the court having jurisdiction of the settlement of the

estate of such deceased allottees, and not in the judge thereof, and such Indian deeds not so approved are void, as may be seen and was so held in *Brader v. James*, 154 Pac. 560, 62 L. ed. 597; *Simpson v. Staples*, 155 Pac. 213; *McCosar v. Chapman*, 157 Pac. 1059; *Moffett v. Conley*, 163 Pac. 118; *Cushing v. Whaley*, 165 Pac. 135; *Bruner v. Nordmeyer*, 166 Pac. 126; *Simpson v. Smith*, 166 Pac. 422; *Lulu v. Powell*, 166 Pac. 1050; *United States v. Western Vest Co.* 236 Fed. 726; *United States v. Knight*, 206 Fed. 145; *Harris v. Gale*, 188 Fed. 712; *MaHarry v. Eatman*, 116 Pac. 935; *Mullen v. Short*, 133 Pac. 230; *Campbell v. Dick*, 157 Pac. 1062; *Hope v. Foley*, 157 Pac. 727; *Boxley v. Scott*, 162 Pac. 688; *Buck v. Simpson*, 166 Pac. 146; *Tiger v. Western Investment Co.*, 221 U. S. 285, 55 L. ed. 738, and *Parker v. Richard*, 250 U. S. 235, 63 L. ed. 954; *Harris v. Bell*, 254 U. S. 103, 65 L. ed. 54; 3rd, that there was no competent evidence adduced in this case to show that any such an approval was ever made by the County Court of Okfuskee County, the alleged copy thereof and the pages of the book where the same were entered, being absolutely incompetent as proofs in said cause, as there was no law, state or federal, authorizing or permitting any such a recordation or use of copies thereof, in which case such copies and entries on said book were wholly incompetent as shown by the authorities cited in this brief and pertaining thereto, which fact left the appellees without any proof whatever that said deed

had ever been approved by said court; *4th*, said exhibit and copy was incompetent because said deed was void when made, or at least failed to convey the legal title to said land, and therefore said alleged approval, had the same actually been made by said County Court, was not a valid approval of said deed for said reasons, and was therefore incompetent to show or establish that said appellees were the owners in fee simple of said land; *5th*, because appellees were not the owners in fee simple of said lands and had the legal title thereto at the time of bringing this suit or on the trial thereof or at any time prior thereto, and neither said deed nor said alleged approval conferred such fee simple title claimed by appellees in this suit, therefore it was not competent to show or establish such claim; and, *6th*, on page 76 is found the ruling of the trial court and exceptions of the appellants thereto as to this alleged approval, as to which the court observed:

“The Court: I understand, but it appears to me that when a deed is put on record duly acknowledged and the record shows it duly approved that that *prima facially* admits it and the burden is on you to show that it was not executed.”

This was the theory of the trial court as to such approval and the deed and their admission in evidence. While the same might have been correct as a general proposition, the same was clearly erroneous in the case at bar: *1st*, because it assumed that

such recordation of such instruments were valid and that such copies were likewise valid and duly certified, when in truth they were not, because there was no law permitting any such recordation or the use of such copies as competent proofs, above shown; *2nd*, the same were incompetent as proof in the case and did not establish the claims of the appellees; *3rd*, the trial court assumed and held that the burden of proof was on the appellants to establish that the same was not executed, which was clearly erroneous, (*a*) because this was a suit brought by Kunkel, and through him and his suit by the Prairie Oil and Gas Company, for the purpose of quieting the title to said lands and removing the claim of the appellants as clouds thereon and to enjoin the appellants from making other contracts, etc., and set up in the bill that said lands were the allotment of Mahaley Watson and had come to the appellant, Hannah Canard Barnett, by descent; that they were both Creek Indians and that the latter was a full-blood Creek Indian and the lands in her hands were restricted; and that she had executed said deed and the same on the date thereof had been approved by the County Court of Hughes County, and on the 17th of June, 1913, by the County Court of Okfuskee County, through which deed and approval the plaintiff Kunkel and the Prairie Oil and Gas Company thus claim said lands in said proceeding, and claimed to be the fee simple owners thereof. This was expressly denied by the appellants

in their cross complaint, as to the execution of such a deed and absolutely denied the validity of such approvals and also denied that said plaintiff or the Prairie Oil and Gas Company owned the fee simple title to said lands thereunder or otherwise. This of course imposed upon Kunkel and the Prairie Oil and Gas Company the burden of proof of their charges and allegations, and especially the valid execution of said deed and said approval set forth and relied upon in the bill of complaint and answer of said Prairie Oil and Gas Company. Not only that, but this is a suit brought by Kunkel as plaintiff, and not by the Barnetts, to quiet the title to said lands, in which case the plaintiff Kunkel and the Prairie Oil and Gas Company, claiming through him under said deed and approvals, must prevail in said suit, if at all, upon the strength of their own title, and not upon the weakness of the appellants'; and a valid title in the complainant is of the essence of his right to relief in this suit to remove these clouds from such title and to establish his own title thereto as presented in his bill of complaint. *Dick v. Foraker*, 155 U. S. 404, 39 L. ed. 201, and many other decisions of various courts generally, which could be easily cited to that effect if needed, but the rule is so general it needs no citation of authority to support it.

(b) Such ruling and holding was erroneous for the further reason that, in section 2126 of the Re-

vised Statutes of the United States, it is expressly provided:

“In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, *whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.*” (Italics are ours.)

The bill of Kunkel in this case shows on its face, as above stated, that Mahaley Watson and Hannah Canard Barnett are Creek Indians, the latter being a full-blood and so enrolled, and that such Indians had been the owners of said land and in possession thereof, and through whom the appellees were claiming said land, etc. Thus, the bill itself and its allegations brought this case squarely under the express provision of said section 2126; and by reason of said section and such charges in the bill, the burden was thereby imposed upon the appellees, and not upon the appellants, to make out a clear title and right to said lands under their claims as set forth in said bill, as it was thus shown that Hannah Canard Barnett had thus inherited said land and was a full-blood Creek Indian and so enrolled; and those facts imposed upon the appellees the burden of showing that said deed was valid in its inception, and that it had been approved in the way and manner provided in section 9, of the Act approved May 27, 1908, as no presumptions are even entertained in such matters

against an Indian and in favor of those dealing with them as to their restricted lands; and such matters should never be construed to their prejudice. *Worcester v. Georgia*, 6 Pet. 515, 11 Pet. 145. So the trial court was clearly in error in admitting in evidence said alleged copy of said alleged approval as the approval of said County Court of said Okfuskee County; and also in thus assuming, and so holding, that the burden of showing the invalidity thereof and of said deed through which appellants claim said lands, was upon Hannah Canard Barnett, which fact alone, we respectfully submit, is wholly sufficient to reverse this case and to defeat all claims of said appellees, as they relied alone upon said deed to said Sims and the purported approval thereof purporting to have been made by the said County Court of Okfuskee County, and should have shown by full and competent testimony that both were valid under said Act of Congress, but the same was not shown in their favor, but was disproven by the appellants, as shown by the record in this case and pointed out in the previous part of this brief.

Tenth Assignment.

This again pertains to the validity of said alleged approval of said Okfuskee County Court, and maintains that the same is not the approval of said County Court under section 9, of said Act of 1908. As this feature has already been discussed in the previous parts of this brief to considerable length,

and numerous decisions in support of our contention cited under the Ninth Assignment, we will not discuss the same any further here.

Eleventh Assignment.

This is that the court erred in holding and finding that R. S. Litchfield had the right to apply for and obtain the approval of said deed four years after its execution, and after Sims, the grantee in said deed, had sold all of his right and interest in said land; and we could further add, after Sims had by his disclaimer in said suit of May 2, 1913, disclaimed all rights or interest in said land.

Near the close of our general remarks on the case in this brief, we have also referred to this feature and discussed it also at length, therein pointing out that it was the theory of the trial court that any one interested could have such a deed approved. For reasons there given, we believe the trial court was in error, both in its theory and in its holding on the point thus involved, and without further discussion here, we refer to what has already been said on that feature of the case.

Twelfth and Thirteenth Assignments.

These assignments are that the court erred in permitting Kunkel to testify that he paid Litchfield for the lands in controversy and had no knowledge of the transaction between Crump and Hannah or between Crump and Litchfield, or any other transac-

tions in the office of Skinner, or of the payment of money to Crump by Litchfield, or what was done at the home of Judge Smith on June 17, 1913, except what was shown by said order of approval, and had no notice or knowledge that the appellants were asserting or claiming any interest in the lands; and in permitting Moody to testify that at the time the Prairie Oil and Gas Company paid the consideration for its lease, that neither said witness nor said company had any notice or knowledge of the relationship between Hannah Canard and her attorney, Crump, or between Litchfield and Crump, and had no notice that said Litchfield had paid money to Crump in connection with the transaction, and had no notice of any transaction by witnesses as to what took place with Skinner, the partner of Crump, or the payment of money to either Crump or Hannah Canard, or as to what was said or done in the house of Judge Smith, June 17, 1913, outside of what was disclosed by the record; and had no notice or knowledge of any claim asserted by the appellants to said lands.

The object and purpose of such testimony of both Kunkel and Moody was, of course, to show that Kunkel and the Prairie Oil and Gas Company were, under their deeds and lease, innocent purchasers of said land, and were, therefore, entitled to said lands and to prevail in this suit, notwithstanding the invalidity of said deed, and of said alleged approval thereof. We have in a previous part of this brief,

upon various grounds and for various reasons, shown, as we believe, that there is no such a thing as a *voidable* deed, for, or an innocent purchaser of, the restricted lands of a restricted Indian; and that, therefore, it was a legal impossibility for either said Kunkel or said Prairie Oil and Gas Company to be innocent purchasers or acquire any rights in said lands, under the facts and conditions disclosed in the record in this case by the testimony herein adduced. If, in our position thus taken and discussed in the previous part of this brief, we are correct, then nothing more on that subject is needed at this time under these assignments. Such testimony of Kunkel and Moody were objected to by the appellants on the trial and their objections were overruled and they excepted to the action of the court, as previously shown, and shown by the record; and we here insist upon the same objections and maintain that such testimony was wholly incompetent for any purpose or upon any grounds whatever, as they were bound to take notice of the public records respecting said transactions; and whether they had any notice or knowledge at all, they are equally bound thereby and by all said transactions which were illegal and fraudulent and in violation of said Acts of Congress, as the appellants were protected and safeguarded by said Acts of Congress, of which all persons must take notice and are bound; and such violations thereof result in

utterly defeating such transactions and the conveyance of the title to such lands protected by said acts; and all persons whomsoever, whether having, or not having, knowledge or notice of such violation, are equally bound by such invalidity in dealing with Indian lands under said acts or otherwise; for as to such lands thus safeguarded by said acts and in dealing therewith, either directly or indirectly, there is no such a thing as an innocent purchaser of such lands, however innocent that purchaser may be or claim to be of such violation. Besides, neither Kunkel nor the Prairie Oil and Gas Company have the legal title to said lands to this day, and without having the legal title to said lands, they can never be innocent purchasers. *Hawley v. Dillard*, 178 U. S. 476, 44 L. ed. 1153, and other decisions thereon heretofore cited.

Fourteenth Assignment.

This is that the court erred in rendering judgment in favor of Kunkel and against Hannah Canard Barnett and Tucker K. Barnett.

This, of course, comprehends the whole case on its merits, and, if the other assignments herein or any substantial part of them are well founded, then, of course, it was error to render such a judgment. As every material aspect of this case has been discussed in the first part of this brief and under the previous assignments, we will not discuss this assignment at this time, for if our premises are correct,

it follows as a matter of course that the judgment itself is erroneous.

Fifteenth Assignment.

This is that the court erred in holding and deciding that the deed from Hannah Canard Barnett to B. O. Sims could be lawfully approved June 17, 1913, more than four years after same had been executed and attempted to be approved by the County Court of Hughes County.

As pointed out in a previous part of this brief, it is alleged at the close of paragraph ten of the amended cross-complaint of appellants, in effect, that at the time of taking said deed it was never the intention or purpose of either said Sims or said Hannah to have said deed approved by the County Court of Okfuskee County. It is also alleged in said cross-complaint that she never intended to sell or convey said land and had often refused to do so, and that on said occasion she supposed she was selling her interest in the allotment of her deceased father, Hully Canard, and even then to Lake Moore. She so testified that she thought it was Lake Moore, and no one disputed it. So the record discloses that she did not know that she was conveying the lands of her deceased child, and she supposed she was dealing with Lake Moore, and not B. O. Sims.

In *Midland Oil Company v. Turner*, 179 Fed. 75, the assignment of a lease involved therein, although approved by the Secretary of the Interior, was set

aside by the court, and it was there held that in the disposition of property the party has a right to choose the person with whom he wants to deal, citing *National Bank of Quincy v. Hall*, 101 U. S. 43, 25 L. ed. 822, point 2, which case holds:

“Where there is a misunderstanding as to the terms of a contract, neither party is liable in law or in equity.”

Evidently there was a misunderstanding in taking said deed to said Sims, on the part of Hannah Canard at least, when she supposed she was selling her father's allotment and not that of her child—to Lake Moore and not to B. O. Sims. B. O. Sims, the notary and witnesses to the deed could have been called as witnesses to disprove what she said, but they were not called, and the facts stand there fully proven by her testimony.

As such deed was thus obtained, really without her knowledge, and with no intent or purpose of being approved by the County Court of Okfuskee County when so obtained, it was utterly void when so obtained, because so taken with no intention of complying with these Acts of Congress, and particularly of section 9 of said Act of 1908; and being thus utterly void, it was not susceptible of any approval by any federal agency; nor was the same susceptible of ratification, nor could its validity be “*waived*” by Hannah Canard Barnett, as so held by the court in *Bartlett v. Okla Oil Co.*, 236 Fed. 488, and in point 4 of *Laughton v. Nadeau*, 75 Fed. 789, which holds:

“Proceedings void for want of jurisdiction cannot be cured by ratification or waiver;”

and in point 3 thereof it was also held:

“Parties dealing with Indians must take notice of publications and Acts of Congress, and do not take land as bona fide purchasers, relieved of restrictions on alienation merely because no restriction appeared upon the patent.”

It may be that had this deed to Sims been legal and taken with the view of complying with said Acts of Congress in the execution thereof, that the lapse of four years within itself would not defeat a valid approval of said deed, in case Hannah Canard Barnett had had knowledge of and participated in such approval. But we deny that a void Indian deed can ever be approved under any of said Acts of Congress, no matter with, or without the knowledge and consent of the Indian grantor; and as to this deed the record discloses, as we maintain, not only that the deed to Sims was utterly void because taken in violation of said acts and reasons heretofore given, but that Hannah Canard Barnett had no knowledge whatever of any such an approval and never consented thereto; and in the procurement thereof, and in the way and manner in which the same was so procured, if at all, was such as to operate upon her and said County Court as a fraud thus also practiced in violation of her rights under said acts, and thereby said approval became a nullity, as so held by this court in its former opinion. Being a nullity, it was wholly

ineffectual for any purpose and especially to operate as an approval of said deed, under section 9 of the Act of 1908. Hence, both deed and said approval were utterly void, and no title whatever was conveyed thereby; and under no circumstances or condition, could the legal title to said land have been thereby conveyed. Hence, as charged in this assignment, it was error to hold that said approval or deed were valid, and the title to said lands were thereby conveyed in the manner provided in said deed, purporting thereon to convey the fee simple title thereof and any and all estates therein.

Sixteenth and Seventeenth Assignments.

These two assignments are that the court erred in holding and deciding that Kunkel was an innocent purchaser and had no notice of the fraud practiced upon Hannah Canard Barnett by her attorney, George C. Crump, at the time the consideration was paid to R. S. Litchfield for said lands; and that the Prairie Oil and Gas Company was an innocent purchaser and holder of the lease upon said lands, and had no knowledge at the time it paid the consideration for the lease of the fraud practiced upon Hannah Canard Barnett by her attorney, George C. Crump.

The grounds of these two assignments have already been extensively discussed in the previous part of this brief, wherein we maintain that appellants could not possibly be innocent purchasers of

such lands or of any interest therein, and for various reasons therein given. We believe those reasons thus given are well founded and show that said appellees had public notice of the rights and interests of said appellants and notice of matters disclosed by said public record that would have put a reasonable man on inquiry, which, if made, would have led to the actual personal knowledge of the rights and interests of said appellants in said land. But, no matter whether they had notice or did not have notice of their rights and interest therein, or of the fraudulent and iniquitious practices disclosed in this record, they are bound by the same just the same, as Hannah Canard Barnett is a full-blood Creek Indian and so enrolled; that she is *non sui juris*, which fact is disclosed by the public records; and that the alienation of said land, as well as their acquisition, was controlled and governed by said Acts of Congress, of whose terms, provisions and conditions respecting said lands and their alienation, said appellants had to take notice, and from which acts and the recordation of the patents therefor, the enrollment of said tribe, and the nature and character of said deed to said Sims when so recorded on March 26, 1909, all disclosed to the world that no such deed could have been made or executed by Hannah Canard Barnett on March 22nd, 1909, and that the same, when so made and ever thereafter, was void because in violation of said acts, and not susceptible of being approved by any federal agency;

and if so attempted to be approved, that such approval was likewise null and void because likewise in violation of said acts and the want of jurisdiction in the federal agency to approve such deeds. Hence, no title whatever in such land, and especially and particularly the legal title thereto, could be conveyed under said deeds, and was not conveyed thereby, because taken in violation of said acts, and therefore neither said Sims nor the appellees, nor anyone else acquired any right or title whatever to said lands, without which title and estate in said lands said appellees cannot possibly be innocent purchasers.

Eighteenth Assignment.

This is the last assignment, and is to the effect that the court erred in holding and deciding that said deed of Hannah Canard to said Sims, executed on 22nd day of March, 1909, two days before the patents for the lands in controversy were approved by the Secretary, and five days before said patents were recorded, was a valid deed and inured to the benefit of B. O. Sims after said patents were approved and recorded.

This feature has also been discussed in different parts of this brief and in different forms and aspects, and is covered expressly by Section 5 of the Act of April 26, 1906, which expressly holds the legal title at least in abeyance, and without vestiture in anyone, until after such patents are first

recorded as therein provided and directed; which fact was recognized and referred to by the Supreme Court of the United States in *United States v. Lane*, 228 U. S. 6, 57 L. ed. 712; and that such title may be so held and such lands kept under the control of the Secretary was recognized by the Supreme Court in *Lowe v. Fisher*, 223 U. S. 95, 56 L. ed. 370, and cases there cited.

That the fee simple title to said land could not be conveyed as was so undertaken in said deed to said Sims, before the patents therefor were approved by the Secretary, and before such patents were recorded and the legal title thereto had vested in Hannah Canard Barnett, is too evident for dispute; and as after-acquired property of an Indian never passes under a previous deed for such land, as held in *Monson v. Simonson* and other decisions heretofore cited, including a decision of this court itself in *Bartlett v. Okla Oil Company*, 236 Fed. 488, citing and relying on said decisions, it is clear beyond dispute that the legal title to said lands never passed under said deed to Sims, at the time of its execution or at any time thereafter, but remains still vested in Hannah Canard Barnett to this day, and appellees are not innocent purchasers of said land.

Where the equities are equal, the legal title prevails, as pointed out from various decisions in *Hawley v. Dillard*, 178 U. S. 476, 44 L. ed. 1157, and

other decisions heretofore cited thereon in this brief. We still rely upon this feature as a distinct assignment in this case, and ask that the same be recognized and enforced against said appellees and in favor of the appellants.

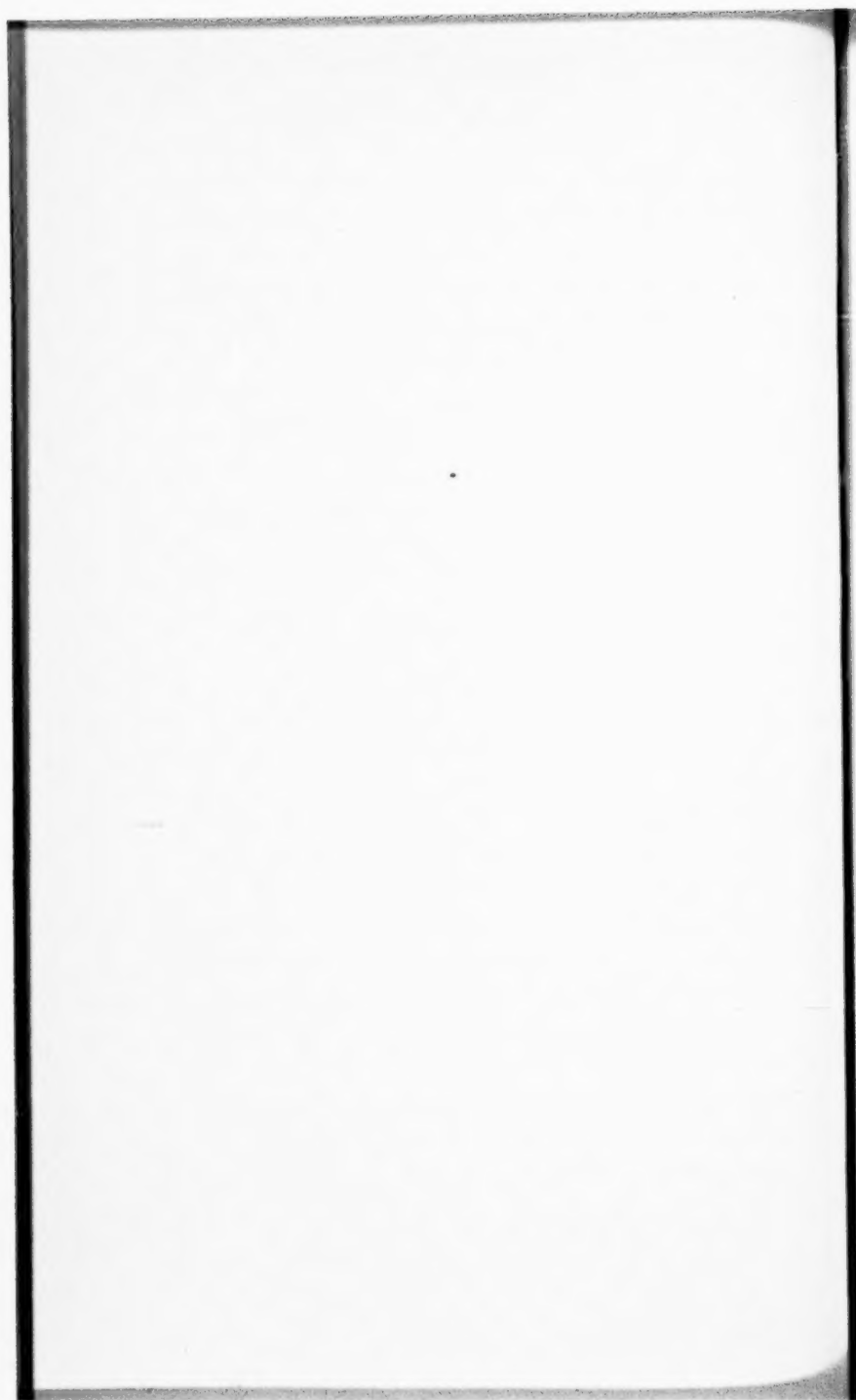
Respectfully submitted,

LEWIS C. LAWSON,

FRANCIS STEWART,

MALCOLM E. ROSSER,

Counsel for Appellants.



APPENDIX.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA.

R. E. Snell, Jr., Katie Snell, G. L. Sandlin and B. O. Sims, Plaintiffs in Error v. Sallie Canard, Leon C. Phillips, Ural A. Rowe and Frank P. Douglass, doing business under the firm name of Rowe, Phillips & Douglass, Defendants in Error.—No. 11956.

SYLLABUS.

1. The County Court in its probate capacity is the court having jurisdiction of the settlement of estates, and, as such, is the federal agency designated for the approval of full-blood conveyances and for such purpose is always open and in session.

2. Failure of the County Court to follow the procedure provided for in Rule 10 of this court in approving conveyances of full-blood Indian heirs, does not render the conveyance void.

3. Failure of the County Court to follow the procedure provided by chapter 198, Session Laws 1915, in approving conveyances of full-blood Indian heirs, does not render the conveyance void.

4. The approval of a full-blood conveyance will not be set aside because the same was approved upon the application of the grantee and

without the knowledge of the grantor that the same was being presented and after suit had been filed by her to set aside the conveyance.

5. Where a deed was executed by a full-blood Indian heir in 1909 and approved by the County Court of Hughes County, which was not the County Court having jurisdiction of the estate of the deceased allottee, and in 1919 an order of approval was entered by the County Court of Okfuskee County, which was the County Court having jurisdiction to approve the same, it was not necessary that a new consideration be paid at the time of the last approval.

6. An examination of the record fails to disclose any fraud in procuring approval of the County Court of Okfuskee County.

7. The approval of the deed related back to the date of the execution of the deed, and rendered it valid from that time, subject to the intervening rights of third persons.

8. Attorneys who procured a contract from a full-blood Indian for the recovery of the land, which contract was duly approved by the County Court prior to the approval of the deed of defendants, and which contract provided that the attorneys should receive one-half of the value of the lands in the event of recovery, are not entitled to recover anything in this cause by reason of the fact that their client can recover nothing.

Error From the District Court of Okfuskee County.

Hon. Lucien B. Wright, Judge.

Reversed and Remanded With Directions.

J. C. Wright, C. T. Huddleston, Logan Stephenson, White & Nichols, for plaintiffs in error.

Phillips & Douglass, Turner & Lucas, Lewis C. Lawson, for defendants in error.

COCHRAN, J. This was an action brought by Sallie Canard against plaintiffs in error to recover certain lands situated in Okfuskee County, Oklahoma. The defendants in error, Rowe, Phillips and Douglass, filed a petition in intervention asserting that they were the owners of a one-half interest in said property by reason of an attorney's contract executed to them by Sallie Canard. Judgment was rendered for the plaintiff for the recovery of the lands in controversy and quieting her title thereto, and for rents. Judgment was also entered for the interveners in the sum of \$2,890.00 as compensation for their services as attorneys and decreeing a lien on the lands to secure the payment. The land in controversy was the allotment of David Canard, who was enrolled as a full-blood Creek Indian and who died in 1901. At the time of his death, he resided in the territory now comprising Okfuskee County and left Sallie Canard as his sole heir. She was likewise enrolled as a full-blood Creek Indian. On March 22, 1909, Sallie Canard executed a deed to said lands to B. O. Sims, and on the same date the deed was approved by the

County Court of Hughes County, Oklahoma. On the 27th day of June, 1917, Sallie Canard filed this suit. On the 9th day of August, 1919, B. O. Sims presented a petition to the County Court of Okfuskee County, asking for the approval of the deed executed to him on March 22, 1909, by Sallie Canard, and on the same day, the County Court of Okfuskee County entered an order approving said deed. The plaintiffs in error rely upon this last approval as validating their title to the lands in controversy. The defendants in error contend that the plaintiffs in error acquired no title under this approval, and that same was invalid for several reasons, which we shall separately discuss.

It is first contended that the approval of the deed by the County Court of Okfuskee County is void because the County Court of Okfuskee County was not in session on August 9, 1919. In this connection, reference is made to Sec. 9 of the Act of Congress of May 27, 1908, which provides:

“No conveyance of any interest of full-blood Indian heirs in such lands shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.”

Attention is called to the use of the word “court” and it is contended that although it has been generally held that the approval of a full-blood conveyance is a ministerial act as distinguished from a judicial act of the court, it was intended that the court should

act in this ministerial capacity and not the judge of the court. Sec. 3178, Comp. Stat. 1921, which fixes the terms of County Courts provides:

“That said courts shall always be open and in session for the transaction of all probate business in their respective counties,”

but the plaintiff contends that this section has no application for the reason that it has been held that the County Courts of this state in approving conveyances of full-blood Indian heirs do not exercise probate jurisdiction, and that, therefore, the approval by the County Court must be in its capacity other than that of a probate court. In *Molone v. Wamsley*, 195 Pac. 484, this court said:

“The County Courts of this state, in approving conveyances by full-blood Indian heirs, do not exercise any probate jurisdiction conferred upon them by the constitution and the laws of the State of Oklahoma, but merely act as federal agents, and in approving the conveyances of Indian heirs perform only a ministerial act.”

In approving full-blood conveyances the County Court does not exercise any jurisdiction of any character conferred by the constitution or laws of the state, but acts simply as a federal agent, but the County Court in its probate capacity is the court which has jurisdiction of the settlement of the estates of deceased allottees and, as such, is the federal agency designated by the Act of Congress, and as such has authority to approve the full-blood con-

veyance. In its probate capacity, the County Court is always in session and has at all times the authority to approve a full-blood conveyance in the exercise of the ministerial function given by the Act of Congress. In *United States v. Black*, 247 Fed. 942, the Circuit Court of the 8th circuit stated as follows:

“It must be borne in mind that ‘the court having jurisdiction of the settlement of the estate’ of Sam Lucas was always in session. We have no desire to conflict with, much less to overrule, those cases which draw a correct distinction between a court and the judge thereof, and limit the power of courts to act in vacation; but the law says there shall be no vacation in the County Court in probate matters, consequently the ‘court having jurisdiction of the settlement of the estate’ of Sam Lucas is always in session.”

It is next contended that the approval of the County Court of Okfuskee County was invalid because the approval was not procured in compliance with Rule 10, of the Supreme Court. This contention has been decided adversely to the contention of the plaintiff in *Haddock v. Johnson*, 194 Pac. 1077.

It is next contended that the approval is invalid because it was not procured in compliance with Sec. 198, Session Laws 1915. This question has also been decided adversely to the contention of the plaintiff in *Molone v. Wamsley*, *supra*.

It is next contended that the approval is void because the grantee presented the deed to the County

Court of Okfuskee County without the knowledge or consent of Sallie Canard, and, after she had filed suit to cancel the conveyance. It is contended that, no petition having been signed by Sallie Canard, the court was without jurisdiction to enter order of approval. It has generally been held that the approval of full-blood conveyances is not a jurisdictional matter and, such being the case, the usual jurisdictional requisites are not necessary. This same question was before the court in *Cochran v. Blanck*, 53 Okl. 317, 156 Pac. 324, and the court said:

“Plaintiffs say in this case the procedure adopted was insufficient to confer jurisdiction upon the court. While it is true that the act of approving said deed is the act of the court, as distinguished from the act of the judge thereof (*MaHarry v. Eatman*, 29 Okl. 46, 116 Pac. 936; *Tiger v. Creek County Court*, 146 Pac. 912), the failure of the court to follow any particular course of procedure does not render said act a nullity nor defeat the jurisdiction of the court to make such order. The conveyance itself was not a judicial act (*Brader v. James*, 154 Pac. 560, not yet officially reported) and the provision requiring approval by the County Court did not change the nature of the transaction.”

In *Lasiter, Adm'r. v. Ferguson*, 79 Okl. 200, the court said:

“As we understand the contention of counsel, their sole ground for setting aside the approval is that the application therefor was made by counsel for the grantee in the deed, and not

by the restricted Indian himself. This does not constitute a ground for setting the approval aside. No statute or rule of court has been called to our attention prescribing any formal practice or procedure in such matters. As has been often pointed out by this court, the provision of the federal statute requiring the approval of deeds conveying the restricted lands of full-blood Indians by the County Court was merely a regulation by Congress through which it was sought to put the Indian on an equality with his prospective purchasers to the end that the transaction might be an honest one, based upon a sufficient consideration, and to prevent the Indian by reason of his improvidence from being overreached and to secure to him a fair price for the premises conveyed."

It is next contended that the approval of the County Court of Okfuskee County was invalid because no additional consideration was paid therefor, and that the original deed was not presented to the County Court for approval. It has been held that no new consideration is necessary to give a County Court jurisdiction to approve a full-blood conveyance in the following cases: *Lomax v. Pickering*, 173 U. S. 26, 43 L. ed. 601; *Barnett v. Kunkel*, 259 Fed. 394; *Hope v. Foley*, 57 Okl. 513, 157 Pac. 727. In the last case, the facts were very similar to the facts in the case at bar, and deeds were executed by Willie Hope in July and August, 1907. These deeds required the approval of the Secretary of the Interior, but were not approved. In 1910, the purchaser procured new deeds of conveyance from Wil-

lie Hope but without any present consideration. On March 13, 1912, Willie Hope filed suit to cancel conveyances executed in 1910, alleging that they were void because they had not been approved by the County Court having jurisdiction of the settlement of the estate of the deceased allottee and were executed without any additional consideration. In June, 1912, the purchaser presented the deeds to the proper County Court for approval, and an order approving same was duly entered. The court in passing on that question said:

“It will be observed that neither of the statutes above set out, authorizing the conveyance of full-blood inherited lands, prescribes as a condition precedent to the validity of a deed conveying such lands that it should only be executed upon a consideration then paid; that the provision providing for the approval—that of 1906 by the Secretary of the Interior, and that of 1908 by the County Court having jurisdiction of the settlement of the estate of the deceased allottee—are that the approval of the particular agency named in the act is essential to the validity of the conveyance. From this fact we take it that proof of the payment of a present consideration is not essential to the validity of such conveyance, but the approval of the approving agency provided in the act renders the conveyance valid, although no consideration was paid or recited in the conveyance.”

In *McCosar v. Chapman*, 59 Okl. 78, 157 Pac. 1059, it was said:

“If it was intended by the third to allege that the consideration for the deed of October 5, 1909, was not paid at the time of its approval, striking this allegation from the petition harmed no one, since the payment of the consideration at the time of the approval of the deed was not necessary to the validity of the conveyance or the order of approval.”

It is contended further that the approval of the County Court of Okfuskee County was invalid because the deed to Sims was not presented to the court for approval. It is not the instrument itself which requires the approval of the County Court but the conveyance of the lands. It is true that the conveyance is evidenced by the deed; but, the deed itself having been executed, we know of no good reason why the conveyance could not be approved without presenting the original instrument.

It is further contended that the presentation of the petition to the County Court of Okfuskee County for approval without the knowledge of Sallie Canard, and without any new consideration being paid although the property had greatly enhanced in value since the execution of the deed, and because a suit had already been filed to cancel the conveyance, which fact was concealed from the County Court of Okfuskee County, constituted a fraud and invalidated the approval. This same contention was made in the case of *Hope v. Foley, supra*, and it was held that the facts were insufficient to constitute fraud.

There is nothing in the record in this case to show that the county judge did not make a full and adequate investigation of this matter, or that any fraud was perpetrated on him. As to the presentation of the petition without notice to Sallie Canard, and the failure to pay any new consideration, we have already seen that those matters would not invalidate the approval.

The approval of the deed by the County Court of Okfuskee County related back to the date of its execution. *Pickering v. Lomax*, 145 U. S. 310, 36 L. ed. 716; *Lykins v. McGrath*, 184 U. S. 169, 46 L. ed. 485; *Almeda Oil Co. v. Kelly*, 35 Okl. 525, 130 Pac. 931; *Tiger v. Jewell*, 22 A. C. R. 104; *Scioto Oil Co. v. O'Hern*, 67 Okl. 106.

It is contended by defendants in error, Rowe, Phillips & Douglass, that their rights as third parties intervene between the time of the execution of the deed and the approval of the County Court, and for that reason the approval could not in any manner affect their rights. The only rights which these parties had was under an attorney's contract, executed by Sallie Canard, which provided that they should receive 50% of the value of the lands in the event of recovery. It thus appears that the interpleaders had no rights in the event the recovery was not had by Sallie Canard, and the approval of the County Court relating back and becoming effective as of the date of the deed and it becoming impossible

for Sallie Canard to recover, the attorneys have no right under that contract.

The judgment of the trial court is reversed and cause remanded with directions to enter judgment for the defendants.

JOHNSON, C. J., and KENNAMER, MASON and BRANSON, JJ., concur.

Filed in Supreme Court of Oklahoma July 10, 1923, William M. Franklin, Clerk.

No. 134

FILED

NOV 20 1923

WM. R. STANSBURY

CLERK

In the
Supreme Court of the United States.

October Term, 1923.

**HANNAH CANARD BARNETT AND TUCKER K.
BARNETT, Appellants,**

VERSUS

**W. A. KUNKLE AND THE PRAIRIE OIL & GAS
COMPANY, Appellees.**

**APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.**

Supplemental Brief for Appellants.

Presenting the points:

1st. That the purported approval by the County Court of Oklahoma County was void because not made at the court house or any place fixed by law for holding court.

2nd. That the purported approval was procured by fraud.

3rd. That appellees are charged with notice of the fraud.

4th. That appellees cannot rely on the doctrine of innocent purchasers.

**MALCOLM E. ROSSER,
CHAS. A. MOON,
FRANCIS STEWART,**

**LEWIS C. LAWSON, Solicitors for Appellants,
Of Counsel.**

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 134.

HANNAH CANARD BARNETT AND TUCKER K.
BARNETT, *Appellants*,

vs.

W. A. KUNKLE AND THE PRAIRIE OIL & GAS
COMPANY, *Appellees*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

Appellants have already filed one brief presenting the questions in this case, but because of the importance of the questions in this case, we desire, with the permission of the court, to present some of the questions involved here from a different angle from that in which they are presented in the principal brief prepared by Mr. Lawson.

The contentions we make in this brief and on which we request the consideration of the court are:

1. That the purported approval by the County Court of Okfuskee County was void because not made in open court, or in the court house or any place fixed by law for holding court.

2. That the purported approval was procured by fraud.

3. That appellees are charged with notice of the fraud.

4. That appellees are not protected by the doctrine of innocent purchaser.

I.

The purported approval was void because not made in court or at any place fixed by law for holding court.

EVIDENCE ON THIS POINT.

The testimony of Mat Dosey (Rec., p. 97) is that during the year 1913, he was clerk of the County Court of Okfuskee County and that A. P. Smith (the record has it W. P., but this is undoubtedly a clerical error) was county judge of Okfuskee County during that year; that Smith went into office during the first part of the year and died in July, 1913; that Smith did not sit on the bench for the purpose of trying cases during the month of June, 1913, and that he was not present at the court house at Okemah in Okfuskee County on the 17th day of June,

1913, the date the order was made; that he was at his residence in Okemah on that date and that he was not in his chambers and was not in the clerk's office on that date; Dosey further stated that he made the entry on page 390 of the minutes approving the deed because the papers were brought in and filed; that he did not remember who brought the papers in, whether Mr. Patterson or Mr. Wallace, but perhaps both together; that he felt pretty sure that Mr. Patterson brought them; that Judge Smith did not hand the order to him; that the order was not made in his presence by Judge Smith; that Mr. Patterson is an attorney of Okemah; that he knew the signature of the judge; that he presumed Patterson was representing the people that was getting the land and that Mr. Wallace was an oil man; that they were at the court house together before they went to Judge Smith's on that day. His attention was then called (Rec., p. 101) to the fact that the word "May" at the end of the order was written in type-writing and that over that was written the word "June," and he was asked whether the word should be May or June, and stated that he could not say "because that is written in pencil and that it was the custom after orders were made to proof read them and if any errors occurred to write over them with a soft pencil;" that he judged the word "June" was written ten days after the order was spread of record; *that he did not know what became of the original order*; that Judge Smith never re-

covered from the illness and never opened court, and was never in the court house after the latter part of May. M. C. Jones, who was clerk at the time this case was tried testified that the original signed order could not be found (Rec., p. 82).

Francis Stewart, one of the counsel for the defendant, testified (Rec., p. 103) that he was one of the attorneys for the defendant and that he examined the records of the County Court of Okfuskee County just before the former trial of this case, which was in December, 1917; that he examined the purported record of the approval, or alleged approval from Hannah Canard to B. O. Simms, just before the trial in December, 1917, and that the record at the top of page 385 was not in the same condition now it was in December, 1917; that in 1917 the last line before the signature was "17th day of May, 1913" in typewriting and with nothing else there, and that at the time he was testifying, there was a pencil notation over the word "May" which seemed to be the word June, written right through the word May; that he, before the trial in 1917, obtained a certified copy of the order. This certified copy is in evidence. It begins at page 154 of the record, and the word "May" just before the signature appears at page 156, and there is no reference in the certified copy to the change or anything to indicate that June or anything else had been written over the word May or upon the record at that point.

In the certified copy offered by the plaintiff, the word June appears just before the signature.

R. D. Wallace testified (Rec., p. 118) that he represented R. S. Litchfield at the time the draft for \$2,000.00 was delivered to Mrs. Barnett.

J. B. Patterson testified (Rec., p. 122) that the order was signed at Judge Smith's home; that the judge was sick at the time and that the judge 'phoned up for Bertha Roberts, the clerk, and he thought she came down and brought the seal and that either Wallace or himself carried the order to the clerk at the request of Judge Smith, and that he was at that time attorney for Litchfield; but was probably acting for Mr. Wallace, who represented Litchfield.

This constitutes the material part of the record so far as it throws any light upon the time and place and manner in which this order was signed and recorded. It appears from this that the court had adjourned in May and never sat as a court thereafter during the lifetime of Judge Smith.

And it also appears that the purported order of approval was made at the residence of the judge and not in the court room or at any place fixed by law for holding court.

ARGUMENT AND AUTHORITIES.

The law requires the approval of deeds to be made by the County Court. Section 9 of the Act of May 27, 1908, provides that:

“That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of section twenty-three of the Act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.”

The Act of May 27, 1908, was passed at the instance and request of the Oklahoma delegation in Congress. We must presume that Congress was fa-

miliar with the Oklahoma constitution and statutes at the time the Act of May 27, 1908, was passed. Certainly the members of the Oklahoma delegation, or some of them, were familiar with said constitution and laws.

That Congress clearly had in mind the distinction between a judge and the court itself, is apparent from a reading of sections 8 and 9 of the Act of May 27, 1908. Section 8 is as follows:

"That section 23 of the act entitled, an Act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for Other Purposes, approved April 26, 1906, is hereby amended by adding at the end of said section, the words: 'or a *judge* of a County Court of the State of Oklahoma'."

This was the section of the Act of 1906 requiring wills of full-blood Indians to be approved by certain officials.

Immediately following this section 8, is the provision of section 9 of the Act of May 27, 1908, as follows:

"That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the *court* having jurisdiction of the settlement of the estate of said deceased allottee."

Unless we are to convict Congress of the grossest carelessness, and of even ignorance, it must be presumed that Congress had in mind the distinction

between the court and the judge, and with reference to conveyances, wanted the court to act, and was not willing that the matter should be left to the judge.

It has been held time and again by the courts of Oklahoma, and also by the Circuit Court of Appeals, that the approval of deeds of full-blood Indians must be made by the court as contradistinguished from the judge of the court. *MaHarry v. Eatman*, 29 Okl. 46, 116 Pac. 935; *Mullen v. Short*, 38 Okl. 333, 133 Pac. 230; *Fisher v. McKeemie*, 43 Okl. 577, 143 Pac. 850; *Cochran v. Blanck*, 53 Okl. 317, 156 Pac. 324; *Campbell v. Dick*, 157 Pac. 1062; *Tiger v. Creek County Court*, 45 Okl. 701, 146 Pac. 922.

In *Tiger v. Western Investment Company*, 221 U. S. 286, this court said, referring to section 9, of the Act of May 27, 1908:

“The obvious purpose of this provision is to continue supervision over the right of full-blood Indians to dispose of lands by will, and to require conveyances of interests of full-blood Indians in inherited lands, to be approved by a *competent court*.”

The lower court, however, held in this case, and also held in *United States v. Black*, 247 Fed. 942, that it was not necessary that an order approving a full-blood deed should be made by the court while sitting as a court or while sitting in the court house at the place for holding court. In this case, the court will see from the record, and as set forth above, the

judge was at his residence in the same town where the court was held. In the *Black* case, the judge was in another town, in a different part of the county. In the *Black* case, the reasoning of the Circuit Court of Appeals to sustain its decision, was that because the Oklahoma Statutes provide that the County Court shall always be open for the transaction of probate business, that the county judge was really the court, and in effect, held that the court went with the judge. The court said:

"It must be borne in mind that 'the court having jurisdiction of the settlement of the estate' of Sam Lucas was always in session. We have no desire to conflict with, much less to overrule, those cases which draw a correct distinction between a court and the judge thereof, and limit the power of courts to act in vacation; but the law says there shall be no vacation in the County Court in probate matters, consequently the 'court having jurisdiction of the settlement of the estate' of Sam Lucas is always in session. Where? At the county seat or some court seat where there is no judge, or where the judge is, although it be away from the county seat or some court seat? We have concluded the latter is meant, and that this deed was approved by the County Court when the county judge approved it within the county, and especially so where the order is subsequently entered of record at a court seat, which we understand was done here."

In other words, the court held that the approval must be by the court, but further held that the court was sitting wherever the judge happened to be.

The decision in the *Black* case was followed by the Circuit Court of Appeal in both appeals to that court in this action. 259 Fed. 394, 283 Fed. 24.

It is our contention that notwithstanding the provision of the Oklahoma Statute requiring the court to be open at all times, it cannot be open except at the places where the law provides for the holding of court.

The Act of May 27, 1908, was passed after Oklahoma was admitted to the Union, and, of course, after the Constitution of Oklahoma had been adopted. The 7th article of the Constitution of Oklahoma creates the judicial department of the state. The 11th section of article 7, so far as it relates to the matter now before this court, is as follows:

“There is hereby established in each county in this state a County Court, which shall be a court of record; * * * The county judge shall be a qualified voter and a resident of the county at the time of his election, and a lawyer licensed to practice in any court of record of the state. The county judge shall be judge of the County Court.”

Section 12, of the same article, is in part, as follows:

“The County Court, co-extensive with the county, shall have original jurisdiction in all probate matters.”

Section 13, is, in part, as follows:

“The County Court shall have the general jurisdiction of a probate court. * * * The County

Court shall be held at the county seat, but the Legislature may provide for holding sessions of the County Court at not more than two additional places in the county."

Section 1617, of the Revised Laws of Oklahoma of 1910, which was in force in Oklahoma Territory prior to statehood and brought over into the Oklahoma Statute by the Schedule to the Constitution, provides:

"It shall be the duty of the board of county commissioners to provide for court room, jail, and offices for the following named officers: * * * They shall also provide the courts appointed to be held therein, with attendants, fuel, lights and stationery, suitable and sufficient for the transaction of their business."

Section 1618, provides:

"The power to rent court rooms shall only extend to such rooms as the court using the same may approve."

Section 1823, is as follows:

"In each county, commencing on the first Mondays of January, April, July and October of each year, except as otherwise herein provided, County Court shall convene at the county seat and continue in session so long as business may require: *Provided*, that said courts shall always be open and in session for the transaction of all probate business in their respective counties."

Section 1828, is as follows:

“The judge of the County Court shall keep his offices at the county seat, in such rooms as the court may provide, and his office shall be kept open at reasonable hours. He shall safely keep all the papers, books and records of his office, or relating to any case of business of the County Court or before him as judge thereof, and receive and pay out according to law, any money which by law may be payable to him. The county shall provide for such tables, desks, cases for books of record and other property or furniture required for his office.”

In many counties in Oklahoma, there are provisions of law providing for the holding of County Court at other places in the county besides the county seat. The provision of many of these acts, creating more than one place for holding County Court in a county are similar. The act dividing LeFlore County into three County Court districts is typical. Section 1, of the Act, (Session Laws, 1913, page 134, section 3292, Compiled Laws, 1921) divides the county into three districts:

“Denominated Poteau County Court District, Spiro County Court District, and Talihina County Court District.”

Section 2, designates the boundaries of these districts.

Section 3, is as follows:

“The place of holding terms of the County Court for the Poteau County Court district shall be in the City of Poteau, and the place of holding terms of the County Court of the Spiro

County Court district shall be in the town of Spiro, and the place of holding terms of the County Court of the Talihina County Court district shall be in the town of Talihina."

Section 6, of the act provides for paying the expenses of the county judge to and from Spiro and Talihina (Poteau being the county seat) and further provides:

"The county commissioners of said county are hereby authorized and empowered to provide suitable court rooms and necessary furniture, together with all necessary records for said courts, the expenses of which shall be paid by the county."

The act creating County Courts in Jefferson County, away from the county seat, contains the following provision:

"All probate cases of appointing administrators, executors or guardians, may be done by the court in either of the said districts, provided that all controversies shall be determined or tried in the district where said guardians, administrators or executors reside."

We do not find anything in the Statute of Oklahoma that indicates that the County Court or the probate court is a peregrinating institution. We do not believe that the judge could make an order in any probate matter on the train going from one of his places of holding court in the county to another place of holding court in the same county. If he has this power, there is danger that some candidates

for county judge at the next election will promise to go into each community for the purpose of transacting probate business arising in that community.

There is every indication in the Oklahoma Constitution and in the Oklahoma Statutes, that it was the intention of the law makers of Oklahoma to require the County Court to be held at some certain place.

The word "court" has a definite meaning. It is more than a judge. It is an organization. "A court is a place where justice is judicially administered." A court is not ambulatory. The county court could not be held at more than three places in the county. (Sec. 13, Art. 7, Okla. Const.) One of these must be at the county seat and the other two must be fixed by the Legislature.

In *Gillespie v. Denny*, (Okl.) 215 Pac. 430, the facts were that an automobile had been confiscated by a purported judgment of the County Court. The court said:

"As to the judgment of confiscation rendered by the County Court, the evidence disclosed that the County Court was not in session at the time this judgment was rendered; that the order had been entered adjourning the court from the 28th day of January to March 3rd, 1919, and the court was not reconvened between those dates. As said in *American Fire Insurance Company of Philadelphia v. Pappe*, 4 Okl. 110, 43 Pac. 1085, 'there is a well defined distinction between the act of a judge and the act of a court.

The law has placed the jurisdiction to pronounce judgment in a court, not in a judge'."

It has been held in many states that a court cannot convene or transact business at any place except the court house. It is true that the Oklahoma Statute does not specifically so provide, but we think that that makes no difference. We think that all of the statutes as well as the Constitution of Oklahoma imply that the court must be held at some particular place and we think further that if the statutes and constitution did not raise any such implication, that it would be a requirement of the common law. The rule that a court must convene at some certain place is more especially true of a court of record. In contemplation of law what is done in the court of record is recorded at the time it is done. The records should be there. It is not the intention of the law that a judge of a court of record should do some act or make some order and then send word to the person having charge of the records, or even write to that person, and tell him what he had done, and order it recorded. The theory of the law is that the acts of the court done in court are then and there recorded by the person having charge of the records.

It is only upon this theory that the records of a court import verity. If a judge sitting at his residence or at some place other than the court room, away from the records, can make orders and direct them to be recorded later, then the theory that the

records import verity stands upon a very slight foundation and in practice would lead to very anomalous results.

In *Ex Parte Stevenson*, 1 Okl. Crim. 127, it was held that a judgment could only be proved by the record. Unless a judgment is rendered where the records are, then its existence will depend on other proof, back of the record. There is no law in Oklahoma authorizing or requiring the judge to sign judgments. *Boynton v. Crockett*, 12 Okl. 56, 61. A paper purporting to be signed by the judge and handed to the clerk by a third party is no proof of anything. Such a document has no legal existence. So far as the clerk is concerned, it is mere hearsay.

As said before, a court is an organization. The County Court is a court of record. It has been the custom from time immemorial to open court by public proclamation. One who has ever observed the impressive ceremony by which this court is declared open for the transaction of business, cannot doubt that the public proclamation of the opening of court is a very important and useful ceremony, and not a mere formal matter. To constitute a court, there should be a place where the court is held by law, the judge should be there, the clerk should be there, and the executive branch of the government should be represented, and public proclamation, should be made notifying suitors and spectators that the court is open. It has been almost universally held that a

court cannot act at a place other than that fixed by law for holding court.

—*Shold v. Van Treek*, 82 Neb. 99, 117 N. W. 113;

Gamble v. Buffalo County, 57 Neb. 163, 77 N. W. 341;

People v. Piasno, 127 N. Y. Supp. 204;

People v. McWeeney, 259 Ill. 161, 102 N. E. 233, Ann. Ca. 1916-B, 34.

McCune v. Reynolds, 123 N. E. 317;

Williams v. Reutzel, 60 Ark. 155, 29 S. W. 374;

Patton v. State. 160 Ala. 111, 49 So. 809;

State v. Woodson, 160 Mo. 444, 61 S. W. 252.

In *Terry v. Filer*, 8 Wend. 568, a party who had been sued in justice court, met the justice on the street and told him to go ahead and render judgment. The court held that the judgment was void, and said:

“If there has been a loose practice as to the entry of judgments by justices on confession, as in the present case, it has been wrong and the sooner it is corrected, the better. The entry of the judgment was a nullity.”

In the matter of *In re Steele*, 156 Fed. 853, which seems to have arisen out of an unseemly controversy between two judges as to who had the right to appoint a referee in bankruptcy), Judge HUNDLEY, writing the opinion, said, quoting from Am. & Eng. Ency. of Law, 24:

"Both the time and place are essential constituents of the organization of a court; that is to say, in order to constitute a court, the officer must be present at the time and place appointed by law."

This opinion also quotes from *Ex Parte Branch & Co.*, 63 Ala. 384, as follows:

"One of the guaranties of Magna Charta is that the court—the power exercising judicial functions—should not migrate with the king, but should hold its sittings at the place and time fixed and settled."

In *Eichoff v. Caldwell*, 51 Okl. 217, 151 Pac. 860, the court said:

"The District Court is a tribunal established for the exercise of definite judicial powers, at a designated time and place, and it is clear that the judge presiding over such tribunal constitutes the court in the sense contemplated by law only when performing functions of the court at the time and place fixed by the constitution and statute."

In *Mell v. State*, 202 S. W. 33, the Supreme Court of Arkansas held it to be reversible error to adjourn to the home of a witness to take his testimony when he was too ill to attend court, and quoted from *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54, as follows:

"The common law defines a court to be a 'place where justice is judicially administered,' and therefore to constitute a court there must be a place appointed by law for the administra-

tion of justice, and some person authorized by law to administer justice at that place, must be there for that purpose. Then, but not otherwise, there is a court, and the judicial power of the state may be there exercised by the judge or person authorized by law to hold it; and if the law prescribed no time for holding the court, the judge might lawfully hold it when, and as often, as he chose. So, likewise, if the place was left to his election, instead of being fixed and prescribed by law, he might lawfully sit in judgment, where he pleased, within the territorial limits prescribed to his jurisdiction, but in this state both the time and place of holding the terms of the Circuit Court in each county are prescribed by law."

Aside from any mere technical considerations, to have a thing done in open court is some guaranty of publicity. A court is a public place. When the hearing of an application to approve a full-blood deed is had in court, some of the public will probably be present. There will be an opportunity for persons other than those making the application to know something of what is going on. It could happen as it has happened in the State of Oklahoma, that some other person would be present and offer more for the land than had been paid for the deed, whose approval is sought, or it might happen that some person present would make suggestions to the court such as would justify him in refusing to approve the deed. These considerations were probably in the mind of Congress when it made the distinction between the County Court and the judge thereof.

In *United States v. Ginsberg*, 243 U. S. 472, this court had under consideration the question of the legality of naturalization proceedings, where the final hearing was had in chambers adjoining the court room. The statute required the final hearing to be had in open court. This court said:

"The term, open court, is used in contradistinction to a judge sitting in chambers. Bouvier's Law Dictionary. The whole statute indicates a studied purpose to prevent well known abuses by means of publicity throughout the entire proceedings. Its plain language repels the idea that any part of a final hearing may take place in chambers whether adjoining the court room or elsewhere."

In this case we think the language of section 9, of the Act of May 27, 1908, indicates a purpose to insure publicity. In addition to the language of section 9, its juxtaposition to section 8, indicates that such was the purpose of Congress.

The very facts of this case, in our judgment, show the reason why a court should be required to act at some particular place. The record shows that the judge was sick. A man unable to appear at the court house in the same town in which he lives, and a small town at that, is not in a condition to transact business. There is a strong probability that this judge was not attempting to transact any business for himself. He was not in a physical condition to make the necessary investigation and probably was not in a mental condition to act with the best of

judgment. He had put aside, apparently, all of his ordinary duties. He was not attempting to discharge the duties of his office except as matters were brought to him at his house; and in a matter of this sort, where it was especially necessary to exercise judgment and to make an independent investigation, he should not have acted at all. He did not act of his own volition, but because of the insistence and request of the representatives of Litchfield. There was no reason in the world why these representatives could not have waited until the judge was ready to resume his duties in the regular way, or until after his death and the appointment or election of some other person to fill his place.

We believe the record in this case will convince the court that full-blood Indians can be induced for a present small cash consideration to make any sort of deed or contract. *The very fact that their deeds require the approval of the court shows that in the minds of the law makers, they are not capable or competent to make their own contracts. It is the duty of the court to investigate. A court has done its whole duty in these matters when it simply takes the statement of the purchaser and the full-blood who is not really competent to make his own contracts, and upon such an investigation approves the deed. It is the duty of the court to know something independently of the statement of both parties to the deed. If the court does not obtain any further information than from the grantor and grantee, the*

provisions of section 8, of the Act of May 27, 1908, requiring the approval of the court, is utterly useless because if the grantor and grantee were not satisfied with the transaction, the deed would not be presented to the court for its approval.

In *Mullen v. Short*, 38 Okl. 333, the court held that it was not necessary that administration proceedings on the estate of a deceased allottee be pending in order to give the court jurisdiction to approve a deed from his full-blood heir, but said:

“It is true, that, in order to protect the interest of the Indian heir, as well as that of the purchaser, the court approving the conveyance ought to have considerable information concerning the land, it would naturally acquire if legal administration of the estate of the decedent had been had; but this class of information can be acquired with as much certainty and more expeditiously and cheaply, in an independent proceeding instituted solely for the approval of such conveyance.”

We think the statement that the court is concerned with the interest of the purchaser, is erroneous. But the statement that it is the duty of the court to know something of the land, is undoubtedly correct.

When the grantee is called up in open court in the sight and hearing of the public and interrogated as to the conditions surrounding the property and as to its value, he is under an entirely different restraint to what he is sitting in the private room at

the private residence of the judge with no one present to question or criticise his statements, and with no one there to know whether he is telling the truth or a falsehood. Further, while we do not want to be considered as disposed to disparage courts, and while we believe ourselves to have all reasonable faith in all courts, still, it is our view that all persons, at all times should be surrounded with all reasonable safeguards of their integrity and honorable conduct. Many men and most judges are so grounded in integrity and honor that their conduct would be the same at all times and under all conditions, but still there are even judges, at least county judges, in Oklahoma who are more likely when sitting on the bench in the presence of the public, knowing that their conduct is open to the public and their acts subject to public scrutiny and criticism, to deal justly and act to the best interest of all concerned, than they would be if they knew that the reasons that influenced them in entering a certain judgment or making a certain order would never be subject to the public scrutiny. We think that all of these reasons are amply sufficient to require that the approval of a full-blood Indian deed should be done by the court sitting at its customary and lawful place, and open in the regular way. In other words, as an organization and not merely as an individual.

As stated before, if the orders made by the court depend upon proof of what happened at some other time and place, then the verity of the record, it seems

to us, is destroyed. The clerk of a court is a constitutional officer. He is an integral part of the court. *United States v. Warren*, 12 Okl. 350, 356. It is his duty to record what is done in the court. It appears from the record in this case that the order was signed by the judge at his home and delivered, not to the clerk and not even to a disinterested party, but to the attorney or agent of the purchaser. As to whether or not it was entered on the minutes just as signed by the judge depends upon the confidence that may be reposed in these interested persons. It appears from the testimony of the clerk and of Mr. Stewart, corroborated by the certified copy that he obtained about the time of the trial, which was introduced in evidence in this case (Rec., pp. 154-156), that some change was made in this record between the time it was delivered to the clerk and the date of the trial from which this appeal is taken. The original order which is said to have been signed by the judge is lost (Rec., pp. 82, 101). Surely it cannot be the law that a record made up in this way imports any verity. In other words, the correctness of the record in this case will depend not upon the fact that the clerk, whose duty it is to keep the records and to record the orders of court, heard the order made, but will depend upon whether the attorneys who procured the order actually gave the clerk for recording, the order that was made by the judge. Probably they did, but the doctrine of verity of records is not founded upon any presumption that parties not connected with the

court have done right, but is founded on the presumption that the officer charged with making the record recorded what was done in open court in his presence. If a party or an attorney for a party can appear before the judge in one place and then take either oral or written information to the clerk in another place and have a record made therefrom, then the verity of records will depend not on the integrity and official oath of the person charged with keeping them, but on the reliability and integrity of an interested party.

The record of the approval has been changed. It is said that this change was immaterial. Possibly it was not very material to change the word "May" to "June." But the court did not order such a change. The judge did not order it. An interested person says he handed an order to the clerk just as it was signed. The clerk says he entered it as it was handed to him. But the original order was lost. The journal has had one change made, slight it is true, and immaterial if any change in a record can be immaterial, when made without notice to interested parties and an order of court, but still a change. Can such a transaction be upheld?

Snell vs. Canard.

One of counsel for plaintiffs in error, Mr. Lawson, has printed as an appendix to his brief, the case of *Snell v. Canard*, decided by the Supreme Court of Oklahoma, July 10, 1923, and he seems to be of the

opinion that case decides contrary to our contention here. To this we do not agree. While that case does cite *United States v. Black*, 247 Fed. 942, with approval, there is nothing in the case showing that the approval in the *Snell* case was not made at the regular place of holding court. It is true that the court held that in its probate capacity, the County Court is always in session, but the case does not show approval at some place not fixed by law for holding court, as was done in this case.

If the judge can act just anywhere, then a probate court in Oklahoma is not an organization. It is a mere bureau.

Besides the technical question involved, we are sure that the evils that will result from a decision by this court that the county judge can approve deeds wherever he may happen to be, will be widespread and disastrous to the protection of full-blood heirs that the statute intended to secure.

II.

The purported approval of June 17, 1913, was procured by fraud.

The Circuit Court of Appeals decided that there was no fraud. The court said:

“The fraud alleged consisted in causing Hannah Barnett to believe that the instrument presented to the court for approval was something other than a deed to the property. In our

judgment, the fraud alleged was not only not proven but the substantial weight of the evidence is to the contrary" (Rec., p. 175).

With the highest respect to that court, the Circuit Court of Appeals entirely misapprehended our contention.

It is true that the bill of complaint alleged (Rec., p. 55) that Hannah Canard Barnett did not understand that she was signing a paper asking for the approval of the deed, but this was only one of the many things alleged in the bill of complaint as constituting fraud.

It was the theory of the plaintiffs, as shown by the bill of complaint, and also by the conduct of the trial, that when this deed was first made, it was presented to the County Court of Hughes County, and a purported approval there made (Rec., p. 138), which was void because made in the wrong county; that afterwards, the plaintiffs entered into a contract with George C. Crump (Rec., p. 14) by the terms of which he was to begin an action to recover this land; that he afterwards began the action by filing the petition (Rec., p. 12) in which he claimed that Hannah Canard Barnett was the owner of the land; that by the fourth paragraph of the contract (Rec., p. 15) there was to be no settlement, dismissal or compromise of the suit without the express approval of the County Court of Okfuskee County; that after the suit was brought, and on the 26th of

May, 1913, George C. Crump transferred the lease which Hannah Canard Barnett and husband had given him, as a consideration for his services, to R. L. Litchfield (Rec., p. 18), and on the same day, Crump made a quitclaim deed to Litchfield (Rec., p. 19); that afterwards, Crump and Skinner, representing Hannah Canard Barnett, filed a petition in the County Court of Okfuskee County for the approval of said deed (Rec., p. 152), in which petition it was alleged that an additional consideration of \$2,000.00 was to be paid; that this petition was presented to the court, and at that time a check for the sum of \$2,000.00 was given to her, and at the same time a certain other check for \$2,000.00, payable to George C. Crump, was exhibited to the county judge, and that it was represented to said judge that Crump was receiving \$2,000.00 also, when as a matter of fact Litchfield, the then purported owner of the land, was paying Crump \$5,000.00, and that if the county judge had known that Crump was receiving \$5,000.00, he would not have approved the deed, and that the failure of Crump to explain the entire transaction and the fact that he was getting a larger sum of money than he represented to the judge, was fraud on the court, for which the approval should be set aside.

The bill of complaint is very long, but if the court will read the portion of the bill of complaint beginning on page 44 of the record and ending on page 58, it will see that all these matters are set up.

EVIDENCE AS TO FRAUD.

The testimony in the case shows the following facts, which are undisputed: In 1919, appellant, then Hannah Canard, executed a deed to the land in controversy to B. O. Simms, which purported to be approved by the County Court of Hughes County, Oklahoma. The County Court of Hughes County had no jurisdiction, the jurisdiction for approval resting with the County Court of Okfuskee County, Oklahoma (Rec., p. 136). In the spring of 1913 an attorney named Crump was employed by Hannah to recover the land. This employment was evidenced by lease and contract, which, by their terms, were made one instrument. This lease and contract bound Crump to bring immediate suit in the proper court to clear title to said lands, and by their terms were made subject to approval by the County Court of Okfuskee County, Oklahoma, which was obtained. The contract further provided that "no settlement, adjustment, dismissal or compromise of any kind shall be made binding upon either of the parties hereto or entered in any court except with the express approval of the County Court of Okfuskee County, Oklahoma, and this clause is a material part of the consideration of this contract." Crump's remuneration was to be an oil and gas lease, but he was to pay Hannah some money when the suit was won (Rec., p. 14). This contract was made on the 27th day of March, 1913, and on the 31st day of March, 1913, suit was filed in the District Court of Creek

County, Oklahoma, to quiet title to the lands (Rec., p. 12), the said Crump and his partner, Skinner, being attorneys of record. On the 2nd day of May, 1913, B. O. Simms, the grantee in the deed of 1919, filed his disclaimer in said suit. The suit was afterwards transferred by the defendants to the United States District Court of Eastern Oklahoma. On the 26th day of May, 1913, and while this litigation was still pending, and while this contract was still in force, Crump sold and assigned his lease to R. S. Litchfield, the principal defendant in the case filed by Crump, and on the same day executed to the said R. S. Litchfield a quitclaim deed to said property (Rec., pp. 18, 19, 20).

The appellant then showed by the testimony of C. C. Stanford (Rec., p. 84), Sam Turner (Rec., p. 91) and Willie Smith (Rec., p. 94) that they were interested with Crump on the deal concerning Hannah's land; that \$5000.00 was received by Crump from R. S. Litchfield, and that both Crump and his partner, Skinner, informed them that the money was from Litchfield in settlement of the law suit. That the court considered this evidence amply sufficient to establish that Crump received the \$5000.00 from Litchfield for this purpose is shown by his remarks during the examination of Hannah Barnett, the appellant (Rec., p. 113):

“The Court: Ask her if she knew of Crump receiving five thousand dollars from Litchfield or any other person by which the matter was to

be compromised—that is, on the theory of the evidence.

Mr. Davidson: It may be on the theory, but that is not what the evidence tends to show at all.

The Court: Shows he received five thousand dollars.

Mr. Davidson: Yes, but not from Litchfield employing him.

The Court: But the court might find it under the status of this record. If I did make special findings I would find it. If he were to stay off the witness stand and Skinner stays off the witness stand and they have all this evidence in here I would take their silence—proceed.”

Neither Crump nor Skinner was produced by appellees as a witness, and no evidence whatsoever was introduced in denial of the testimony regarding the \$5000.00. The evidence shows that the appellant, Hannah Barnett, did not know and never knew of Crump receiving this \$5000.00 (Rec., p. 113). The evidence further shows that Hannah is an illiterate full-blood Indian, unable to read, write or understand the English language, necessarily has to carry on a conversation through an interpreter, is totally unskilled in business transactions, of any kind, and never had any other deal in her life except this one (Rec., p. 110); that she was looking wholly to and relied on her attorney to represent her, and relied on the representations that he made to her regarding the deed and the suits; that her attorney Crump

told her there was a possible chance to get her land back but it required too much time and, therefore, that he wanted to be released from his contract and would pay her to be released, offering her \$2000.00. This conversation with her occurred, the evidence shows, at or about the time Crump made his assignment and deed to Litchfield [(Rec., p. 109) and see date of alleged approval (p. 141) and records of assignment and deed (pp. 18 and 19)]. The testimony shows that after this conversation the appellant was turned over by her attorney to R. D. Wallace, who was the agent of R. L. Litchfield in the transaction, and to J. B. Patterson, who was an attorney for Litchfield or for Litchfield's agent, and taken before the county judge, who was ill at his residence and not at the court house. That Crump did not even appear before the county judge to protect her or to explain matters; that he wrote across the petition: "I have examined the facts herein and ask that deed be approved. G. C. Crump, May 16, 1913" (Rec., pp. 152, 154). Petition for approval of the deed is signed by Crump and Skinner, attorneys for appellant. Nothing whatever is said in the petition for approval or the order of approval relative to the litigation or that the purported approval was in settlement of the litigation; nothing said as to the assignment by Crump or his quitclaim deed. On the other hand, it is shown by the record that instead of disclosing the whole transaction to her and to the county judge, Wallace, the agent for Litchfield, to whom Crump

had turned over his client, produced two checks before the county judge for \$2000.00 each, one payable to her and the other payable to Crump. This appears from the testimony of J. B. Patterson, who is one of the attorneys for appellees herein. These checks were R. S. Litchfield's checks, presented before the county judge by Litchfield's agents.

ARGUMENT AND AUTHORITIES.

The gist of fraud "is fraudulently producing a false impression upon the mind of the other party; and, if this result is accomplished, it is unimportant whether the means of accomplishing it be words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff." *Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383-388, 32 L. ed. 439; *Miller v. Wissert*, 38 Okl. 808, 134 Pac. 62.

In this case, Crump represented Hannah Canard Barnett. It was his duty to put the county judge in possession of all the facts. That was also the duty of Litchfield.

Crump had a contract to recover the land for the woman. In violation of his contract, he assigned his lease and made a quitclaim deed to Litchfield on the 26th of May, and on that date wrote across the application for approval, the statement that he had examined the facts and asked that the deed be approved (Rec., p. 154). He then, without the approval of the court, abandoned his contract, and placed him-

self in a position where it was to his interest to have the deed approved, and where if the deed had not been approved, he could not have gone on with his contract to recover the land. The county judge should have known these facts.

Then the representation was made to the judge that Crump was getting the same amount that was being paid to the woman, \$2000.00, when as a matter of fact he was being paid \$5000.00. This was fraud. Under the Oklahoma law, an attorney cannot make a contract for a contingent fee of more than fifty per cent of the recovery. Comp. L. 1921, Sec. 4101. It cannot be presumed that any court would have approved the deed if he had known that the attorney was receiving more than his client for her property.

The trial court in effect found that there was fraud.

The trial court said (Rec., p. 113):

“But the court might find it under the status of this record. If I did make special findings, I would find it. If he were to stay off the witness stand and Skinner stays off the witness stand and they have all this evidence in here, I would take this silence—proceed.”

Later, on the same page, when the plaintiff, Hannah Canard Barnett was being interrogated as to what she would have done if she had known Crump was receiving pay, the court interrupted and said:

“It is not necessary to prove that. If he takes pay on both sides it would be fraud.”

And then he commented on the innocent purchaser question. On page 112 of the record also is a statement of the court showing very clearly the theory upon which he decided the case.

It was the duty of Hannah's lawyer to tell the court all the facts.

It was Crump's duty to put the county judge in possession of all the facts. Both Hannah and the county judge had already repudiated the deed, Hannah by bringing the suit, and the county judge by approving the contract by which she employed Crump to bring the suit. Litchfield knew of all these things.

One who seduces an agent to betray his principal, or an attorney his client, can hold none of the fruits of his bargain. *Alger v. Anderson*, 78 Fed. 729; *Barnett v. Kunkle*, 259 Fed. 394.

The purported approval, obtained under the circumstances of this case, away from the court records, before a county judge practically on his death-bed, through the manipulation of an attorney who had abandoned his client and repudiated his contract, was obtained by fraud practiced both on Hannah and the court.

III.

Appellees Kunkel and Prairie Oil and Gas Company, are charged with notice of the fraud practiced in obtaining the purported approval of the deed.

It is our contention that appellees are charged with notice of the fraud in this case, even though it shall be held that removal of restrictions obtained by fraud is merely voidable and not void and that an innocent purchaser obtains good title through such a proceeding.

It is the law that notice of circumstances sufficient to put a reasonable man on inquiry is equivalent of notice of any fact inquiry would have revealed. Oklahoma has a statute to the effect that no deed, mortgage, contract, bond, etc., relating to real estate, shall be valid as against third persons unless acknowledged and recorded, but that actual notice shall be equivalent to acknowledgment and recording. The statute also provides that actual notice consists in express information of the fact, and that constructive notice is notice imputed by law to a person not having actual notice. But notwithstanding these provisions, our Supreme Court held in *Cooper v. Flesner*, 24 Okl. 47, 103 Pac. 1016, that knowledge of facts sufficient to put a prudent man on inquiry was equivalent to actual notice, and that case has been consistently followed in many opinions by our Supreme Court, ever since it was rendered.

All the exhibits attached to the cross bill of appellants were admitted in evidence (Rec., p. 117).

Exhibit 5 (Rec., p. 156) is an oil and gas lease from Hannah Canard Barnett to George C. Crump, her attorney. This lease states that part of the consideration "Are the employment and services of George C. Crump as per the terms and conditions of the written contract of said parties hereto of this date above referred to, *which contract is herewith made a part hereof.*"

This lease further provides: "That there shall be no assignment of this contract or any rights thereunder until the title to the allotment of Mahaley Watson, deceased, shall have been quieted as per the terms and conditions of the written contract hereinabove referred to."

The contract referred to in the lease, which was introduced in evidence as appellees' Exhibit 4, and which appears in the printed record at page 14, after referring to the lease and describing the lands, contains the following:

"The said parties of the first part hereby employ the services of said Geo. C. Crump as attorney for the purpose of bringing immediate suit in the proper court, and prosecuting the same to a final determination with all due diligence, for the purpose of quieting the fee simple title to all of the property described in section '1,' inclusive, subject only to the oil and gas lease hereinabove referred to on a part of said property, such suit to be instituted and

prosecuted as above indicated by said Crump at his own costs and expense, neither of said first parties to be liable for any attorney fee, costs or expenses of any kind in such litigation or in any matter incident to said litigation or in any matter incident to the quieting of said title, but all of same shall be borne personally by said Crump, without reimbursement or liability of any kind or in any manner by or on the part of either of the first parties.

"That no settlement, adjustment, dismissal or compromise of any kind of said suit shall be made by or be binding upon either of the parties hereto, or entered in any court, except with the express approval of the court of Okfuskee County, Oklahoma, and this clause is a material part of the consideration of this contract. The said Hannah Canard Barnett agrees to allow the use of her name as a party plaintiff in the prosecution of all rights under this contract or defendant as the case may be.

"That when proper final decree quieting said fee simple title as aforesaid in said Hannah Canard Barnett is made and entered in the court of proper jurisdiction (and such decree shall also contain a clause canceling all adverse or hostile conveyances), the above recited additional consideration of \$900.00 for said oil and gas lease to said Crump shall immediately thereupon be due and payable in cash by said Crump to said Hannah Canard Barnett, and said Crump agrees to immediately thereupon pay the full sum of said \$900.00 net to said Hannah Canard Barnett.

"That a copy of this contract shall be filed with the court in which the suit hereinabove referred to is filed.

“This contract is made and entered into subject to its approval by the County Court of Okfuskee County, Oklahoma.”

This contract was approved by the court and the approval of the court is shown at page 159 of the record.

The plaintiff in this action, Kunkel, knew about the former suit that was filed in the state court, that being the suit in which Crump was employed under the contract and lease (Rec., p. 128). Plaintiff states that the oil and gas lease was probably in the papers and was examined by the attorney. The abstract was examined by attorneys. The plaintiff states that he had the same attorneys that the Prairie Oil and Gas Company had to examine the abstract (Rec., p. 129). Mr. Moody, who was president of the Prairie Oil and Gas Company, stated that the title was probably examined. The lease from which the above quotation is made was in the abstract. There can be no doubt about that. The abstracters put in everything that is pertaining to the title to the land being abstracted, and in northeastern Oklahoma the oil and gas leases are, generally speaking, the most important part of the abstract. Therefore, whether Kunkel or Moody knew personally about this or not, their lawyers did and they are charged with that knowledge. 2 Ruling Case Law, 962; 27 Ruling Case Law, 708. In the face of this contract, George C. Crump made an agreement with R. S. Litchfield, in which he assigned his lease to

Litchfield (Rec., p. 18), and on the same day he made a quitclaim deed to the said Litchfield (Rec., p. 19). All of these things appear in the abstract, so that Kunkel or his attorneys, which is the same thing, knew that Crump had violated the terms of his agreement made with Hannah Canard Barnett, and also the terms of the lease which he had obtained from her by transferring the title or his interest, to Litchfield. He knew, or his attorneys knew, that Crump had no right to settle, adjust, dismiss or compromise any suit without the express approval of the County Court, and he also knew that no order of the County Court had ever been made expressly approving any compromise of the suit which Crump had brought. When this is considered in connection with the fact that Litchfield would not at first give a warranty deed to the property (Rec., p. 148), it seems perfectly clear that Kunkel should be charged with notice of what had taken place in connection with the approval of this deed. He is charged with notice of everything shown by the records. 2 Pom. Eq., (4 ed.) Sec. 626. He had before him, or his attorneys had before them, the contracts with Crump, in which he had agreed not to settle without the express consent of the County Court. He also knew that express consent had not been given. There had been one attempt to approve the deed, which had failed of its purpose. The record of that approval was better than the purported record of the last approval, but it had developed

that the first approval was not good. Everybody connected with the matter had notice through the failure of the first approval of the fact that a record was not sufficient; that there were facts that had to exist whether the record showed that or not, and that it was necessary to make outside inquiry. It would have been the easiest thing in the world for Kunkel to have investigated this and for him to have ascertained what actually occurred in connection with the purported approval. He had notice of the relation between Crump and the Barnetts. While we do not contend that the facts are similar, we refer the court to *Wollenshlager v. McLean*, (Cal.) 166 Pac. 853; *Rector v. Wildrick*, 59 Okl. 172, 158 Pac. 610; *Cooper v. Flesner*, 24 Okl. 47, 103 Pac. 1016; *Brooks v. Reynolds*, 37 Okl. 767, 132 Pac. 1091; *Wahl v. Stoy*, 66 Atl. 176; *Hemsley v. Marlborough House Co.*, 61 Atl. 455; *Smith v. Vreeland*, 16 N. J. Eq. 198; *Ringgold v. Waggoner*, 14 Ark. 69; *Johnson v. Thweatt*, 18 Ala. 741; *Hingtogen v. Thacker*, 121 N. W. 839; *Canadian & American Mortgage & Trust Co. v. Edinburgh-American Land-Mortgage Co.*, 41 S. W. 140; *Creek Land and Improvement Co. v. Davis*, 28 Okl. 579, 115 Pac. 468. In the last cited case, the Jeffersons made a deed to Brucker and Brucker advanced to the Jeffersons \$235.00, and entered into a written agreement for the repayment of the same before November 1, 1904, which agreement provided: "If said payment shall not be made on or before the said stipulated date, said

Maria J. James, Jefferson shall have no right to acquire said land or any part thereof at any future time." This agreement was not acknowledged or recorded but the deed to Brucker contained the words "subject to contract" in the consideration clause, which read: "\$235.00, subject to contract, in hand paid," and this deed was recorded. The court said:

"The only question of importance for us to determine is: Did the presence of the words 'subject to contract' in the body of the duly executed and recorded deed from the Jeffersons to Brucker charge his grantees and those claiming under them with notice and the duty of ascertaining the terms of the unrecorded contract, entitling grantors to a reconveyance upon the repayment of the money borrowed; for we believe there can be no serious doubt about it having been the intention of the parties to the original conveyance to make a mortgage, and not a deed, nor that when Brucker sold the land he did so in plain flagrant violation of his solemn contract, and in fraud of the parties who had trusted him. Counsel for defendant contend that, their client having no actual knowledge of the contract relied upon by plaintiff, the mention thereof in the original recorded conveyance was insufficient to charge it with the actual notice which they claimed essential to make them responsible under the law applicable when this transaction took place.

"The general rule in these cases is stated in Wade on Law of Notice (2nd ed.) at section 310, as follows:

'The doctrine embodied in the gener-

al statement that a purchaser of realty takes with notice of every adverse legal claim or outstanding equity disclosed by the recitals contained in any of the papers under or through which he traces his title is of universal recognition, both in this country and Great Britain, subject, however, to such refinements and modifications as the peculiarities of adjudicated cases have from time to time demanded.'

"But it is contended that the phrase, 'subject to contract,' was insufficient to convey notice of anything whatsoever, that it was an 'orphan phrase' without connection with the context, and conveyed to the defendant no notice of any kind of any outstanding legal claim or equity. It must be admitted that standing by itself it conveyed to grantee, in and of itself, no definite information of the extent of the grantors' claim. But, having been by the grantors placed within the body of the deed for the purpose and with the intent of giving notice of the claim, right, or equity yet retained or held in and to land, was it not sufficient to warn and require all subsequent takers to investigate what contract it was to which that deed had been by its maker made subject? Could a party with notice of that clause say in view of the conceded facts in this case that his claims and rights were superior? * * *

"We therefore concur in the conclusion reached by the master which was approved in the judgment and decree of the trial court holding that the defendant in this case was charged with actual notice of the terms of the contract between the Jeffersons and Brucker, for the reason that the deed containing the phrase 'sub-

ject to contract' was notice sufficient which, had it been pursued, would have disclosed the terms of the contract to which reference was made."

The argument will be made that the approval by the County Court of this old deed from Hannah to Simms was a sufficient release of Crump from his contract, but it is pretty clear from the record what was actually done. The county judge was sick. He was not able to attend to business and the representatives of Litchfield took the deed in for approval. The county judge was not at his chambers or in the court house, and therefore had no access to the records as to what he had done theretofore in connection with this matter, *and it was not called to his attention*. It is hard enough for judges in good health with records of their courts before them, to remember what has been done in connection with matters coming before them, and it cannot be expected that a judge who was practically on his deathbed, as the record in this case shows Smith was, would remember that sometime before that he had approved a contract which prohibited Crump from making a settlement of the case without the approval of the court. So it is fair to presume, and we think the record in this case shows, that he made no investigation of the circumstances which led up to the application for the approval of this deed. It was not called to his attention that in violation of his contract and without the approval of the County Court Crump had already executed a quitclaim deed to this prop-

erty to Litchfield, and had already assigned his lease. In other words, Judge Smith did not know that at the time Crump was attorney for Mrs. Barnett, asking to have the deed approved, that he had already abandoned the relationship of attorney and in violation of his solemn contract, had delivered to Litchfield everything that he could towards perfecting the title to the property.

Before the county judge could approve the compromise between the parties or relieve Crump from the conditions of his contracts, there must have been something filed asking for some action in that regard, *or at least the terms of the contract and lease between Crump and the woman must have been brought to attention of the judge so he would have it in mind when passing upon the request to approve the deed. In other words, unless the judge knew at the time he was acting upon the approval of the deed, that the woman had a contract with Crump which bound him to clear her title, and from which he could not be relieved without a special order of the court, the judge could not be presumed to have intended to relieve him and could not be presumed to have intended by the approval of the deed to approve the previous conduct of Crump in the matter.* Kunkel saw from the record that it required an order of court to relieve Crump and he saw from the record that Crump, prior to the purported approval of the deed, had breached his contract and had violated his duty as attorney. That is perfectly clear

from the record. Charged with that knowledge, it was his duty to investigate and to see how much further and in what other ways Crump had breached his duty or what fraud he had practiced in inducing the court to relieve him of his contract and make a title in Litchfield which he did not theretofore have.

The woman was helpless. She was a full-blood Indian. She had employed Crump. He was the only lawyer that she knew in connection with the matter. The courts constantly hold that lawyers are in a position to take advantage of their clients, even though their clients may be intelligent business men. How much stronger should be the rule in a case of this sort where the client is a poor, ignorant, full-blood Indian woman. It is apparent from the record, and Kunkel knew from the record, that Crump had violated his duty and that he had executed papers in favor of Litchfield before his client's deed had been approved. He was to that extent taking advantage of her and placing her in a bad position to prevent the approval of the deed. Litchfield's lawyers saw that and therefore it was their duty to probe further and to see how much fraud had actually been practiced. We cannot believe that the slightest investigation would have failed to reveal the fact that Litchfield had paid to Crump more than he paid the woman, and the record shows of course that this knowledge was withheld from Judge Smith at the time he purported to approve the deed.

While, in the foregoing, we have said that the contract with Crump and lease to him appeared in the abstract, and while there can be no reasonable doubt that they did, still it makes no difference on the question of notice whether they did or did not. They were recorded and Kunkel was charged with notice of their existence.

The Oklahoma statutes, sections 1659, 1663, and 1665, Revised Laws, 1910, require the register of deeds (the county clerk is now *ex-officio* register), to keep both direct, inverted and numerical indexes of all instruments recorded and also "to make correct entries in such numerical index of all instruments recorded concerning tracts of land under the appropriate heading, and in the subdivision devoted to the particular quarter section described in the instrument making the conveyance," etc. The statute prescribes the form for such indexes. In the index the land must be described in at least 40-acre tracts, names given, and the book and page where the instrument recorded is given.

In states having such laws requiring indexes to be kept, it is held that a purchaser has notice of all instruments recorded which affect real estate, and that the indexes are a part of the record. In construing similar recording acts, the Supreme Court of South Dakota, in *Fullerton Lumber Co. v. Tinker, et al.*, 118 N. W. 700, said:

"It will be observed, from a reading of these sections, that a party purchasing real

property is not only required to examine the indexes of grantors and grantees, mortgagors and mortgagees, in his chain of title, but also required to examine the numerical index, to ascertain whether there are other conveyances or incumbrances affecting said property not in the chain of title. All public officers are presumed to have performed their duty, and hence the register of deeds of Charles Mix County must be presumed to have properly kept the indexes required by these sections. Clearly, therefore, if the defendant Williams had examined the record in the register of deeds' office, or if he had examined a properly prepared abstract of title, he would have acquired actual knowledge of the existence of the plaintiff's mortgage, and, having acquired such knowledge of the mortgage, the conveyance to him was subject to the lien of the mortgage.

“ * * * The purchaser must be held here charged with notice of all the information that might have been obtained by an examination of all the indexes required to be kept by the register of deeds relating to the property.”

See, also:

Balch v. Arnold, (Wyo.) 59 Pac. 434;
Edwards v. McKernan, (Mich.) 22 N. W. 20;
Jones v. Berg, (Wash.) 177 Pac. 712;
Herndon, et al., v. Ogg, (Ky.) 84 S. W. 754;
Barney v. Little, 15 Iowa, 527;
Clinchfield Coal Corporation v. Steinman,
213 Fed. 557.

It has been held moreover, that a party is not entitled to rely on an abstract, but is charged with notice of the record.

—*Talbot v. Joseph*, (Ore.) 155 Pac. 184.

IV.

The appellee cannot rely upon the doctrine of innocent purchaser.

This is true for the reason that Hannah Canard Barnett was an incompetent, and as to the fee for the further reason that appellee paid nothing.

- 1. Appellee cannot rely upon the doctrine of innocent purchaser because Hannah Canard Barnett was an incompetent.**

It is clear that the court would not have made the purported order approving the deed without the consent of Hannah Canard Barnett. It is also clear that she would not have consented had she known that her lawyer was getting more out of the deal than she was. She supposed he was getting half. As to this land, Hannah Canard Barnett was restricted. The only way the restrictions could be taken off would be through a deed executed freely and voluntarily, approved by the County Court after a full and fair investigation. She was not as to this land *sui juris*. She stood in the same attitude as if she had been a minor or insane. *Goodrum v. Buffalo*, 162 Fed. 817-827,

Ruling Case Law, 27, Sec. 440, is as follows:

“In case of conveyances by persons *non sui juris* which may be avoided as between the parties, the question has arisen in a number of cases as to whether this right of avoidance ceases when the title has passed into the hands of third persons in good faith for an adequate consideration and ignorant of any such facts tend-

ing to impeach such title. On this question the authorities are not in entire accord. If the conveyance is to be deemed absolutely void and therefore insufficient to divest the grantor of the legal title, it would seem to follow that a bona fide purchaser from the grantee can secure no rights to protection. And, according to the better view, which has the approval of Mr. Bishop (Bishop on Contracts, Sec. 297), even though the conveyance is not to be considered void but merely voidable, a bona fide purchaser takes subject to the right of avoidance. In this respect the rule differs, and properly so, from that prevailing where the conveyance is voidable for a fraud perpetrated upon the grantor, as in the latter case there is the assent of competent parties induced merely by fraud and the capacity in fact to convey an indefeasible title which does not exist in the case of persons *non sui juris*. Also in the case of a conveyance by a person *non sui juris*, incapacity of the grantor to convey is not, like fraud, a circumstance wholly extraneous from the title. The deed shows who the grantor is, and all persons claiming thereunder are bound to know the identity of such grantor and it is not unreasonable to demand that he also take notice of the want of capacity to convey anything more than a defeasible title. *Furthermore, the protection extended to innocent purchasers of real estate rests upon the doctrine of estoppel. The theory is that the grantor has done something, or omitted to do something which has induced a third person to act upon the appearance of things and to invest his money in the land. In other words, some act must be done, or there must be some omission which would render the avoidance of the convey-*

ance a fraud upon the person who invested his money, relying upon the act done, or the appearance of things caused by such omission. And it is the general rule that a person non sui juris, especially in case of an insane person, cannot be subject to such an estoppel. A contrary doctrine would also practically destroy a salutary rule established to protect infants and the like against the consequences of improvident conveyances." (Italics ours.)

We call attention to the portion of the section just quoted, which is in italics. In this case the deed showed who the grantor was and it was the duty of all subsequent purchasers to ascertain at their peril whether or not the grantor had been imposed upon. See, also, 39 Cyc. 1692.

In *Hull v. Louth*, 109 Ind. 315, 58 Am. Rep. 405, the court, speaking of the contention of persons claiming to be an innocent purchaser, said:

"His counsel argue that deeds from persons of unsound mind before an inquest of lunacy are not void, but voidable only; that the ground upon which such deeds are set aside is fraud, and that fraud which overthrows such deeds as between immediate parties will not affect the title of innocent purchasers from the rational party. The position of counsel is too narrow. If it were admitted to be correct as a rule of law, it would allow that in no case can the property of a person of unsound mind be reclaimed unless actual fraud has been practiced, or the conveyance has been accepted with knowledge of such unsoundness of mind, which knowledge of itself

might amount to fraud. But such is not the law as we understand it. The courts scrutinize with jealous care all contracts made with persons of unsound mind, and will set them aside if fraud has been practiced.

“And so in all cases fraud vitiates contracts. But in the case of contracts with persons of unsound mind, the courts do not stop with the inquiry as to whether or not actual fraud may have intervened. Such persons are regarded within the watchful and protecting care of the courts, and when it is discovered that they have entered into contracts, except in some cases which need not here be enumerated, such contracts will be set aside because of their mental infirmity, whether there has been actual fraud or not. But if it should be conceded that fraud alone is the ground upon which such contracts are set aside, it would not follow necessarily that third parties should be protected as in cases of fraud, where the contracting parties are mentally sound, and capable of managing their property and understanding the force and effect of contracts. In such a case, two rational minds meet, agree upon, and presumably comprehend the contract. One of the parties, by shrewdness, or by deceit and false representations, may overreach the other, yet that other is rational, and capable of yielding assent to the contract as made. For this reason, he will not be heard to urge the fraud to the detriment of innocent third parties. In some cases, too, one of the parties may have been able to avoid the fraud of the other by the exercise of reasonable care. With persons, such as it is alleged Emma J. Taylor was, and is, the case is radically different. They are wanting in that which is

essential in all contracts, the mental ability to comprehend and yield assent to the contract. They cannot, therefore, in any case, be chargeable with want of care in being overreached by the other contracting party."

In *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. 837, suit was brought by minors to recover land sold during minority. The contention was made that because lands had been sold to an innocent purchaser there could be no recovery. The court said:

"Appellee contends that when the grantee of the minor sells the land for value to a purchaser in good faith, the right of disaffirmance is lost. We have found no authority to support the proposition. Such a doctrine would enable the grantee to make the deed valid by a mere sale to an innocent purchaser, and would practically destroy a rule established to protect minors against the consequences of improvident conveyances of their property."

In *Bowman v. Okley*, 212 S. W. 549, the same rule was applied to sale without authority made by trustee.

The statute requiring deeds of full-blood Indian heirs to be approved by the County Court was notice to all the world that such people were not competent. If by devices such as were employed in this case or many others that might be devised by people who have since allotment made a business of separating these illiterate Indians from the last acre of the land which their ancestors occupied, good title

can be obtained, when the provision that their deeds are subject to the approval of the court will fall far short of giving the protection which Congress intended or to which they were entitled. Hannah Canard Barnett, in the eyes of the law, was incompetent. If a minor makes a deed before it comes of age, the deed can be set aside. If the administrative act of the County Court was obtained by fraud, justice requires that it be set aside and it was the duty of any purchaser of the land to see that everything leading up to the approval of the deed was regular and fair and that no fraud was practiced. As stated in Ruling Case Law, quoted above:

“The protection extended to innocent purchasers of real estate rests upon the doctrine of estoppel. The theory is that the grantor has done something or omitted to do something which has induced a third person to act upon the appearance of things and to invest his money in the land. In other words, some act must be done or there must be some omission which would render the avoidance of the conveyance a fraud upon the person who invested his money relying upon the act done, or the appearance of things caused by such omission. And it is the general rule that a person *non sui juris*, especially in the case of an insane person, cannot be subject to such an estoppel.”

The protection of innocent purchasers must rest on the doctrine of estoppel. A stolen horse can be recovered from an innocent purchaser. The purchaser may have paid full value, but that will not protect

him. What is the difference between his case and that of an innocent purchaser from a person who has obtained title by fraud? Simply that in the case of a person defrauded he has done something himself to enable the person who had cheated him, to cheat someone else. He, having first trusted, must first suffer, *but that rule should not be extended to a person who is incompetent*. The statute gives notice that the Indian heir is easily cheated.

Hannah Canard Barnett as to this land was *non sui juris*. It is well settled law that the restrictions cannot be removed from Indian lands by any rule of estoppel. The Supplemental Creek Treaty, 32 Statute at Large, 500, which restricted the lands of the allottees in the Creek Nation, provided that conveyances in violation of the statute imposing restrictions should be absolutely null and void and that no rule of estoppel should ever be invoked in order to make them valid. It has always been the understanding of the courts and bar that in this regard all restrictions stood upon the same basis.

It will be a strange thing if the statutes of the United States shall treat this woman as being incompetent and at the same time the courts shall by a species of estoppel take from her property out of which she has been defrauded.

2. Admitting for the sake of the argument that the defendant, Prairie Oil and Gas Company, ever held the lease as an innocent purchaser thereof, still the appellant must recover the fee or royalty interest.

The rule adopted by courts of equity protecting bona fide purchasers, arises out of an estoppel. The owner of the land by some act has placed it in the power of his vendee to deceive third persons and when such third persons have been so deceived and have paid money or other things as a result thereof, they are protected, but before they can be protected they must show that it will be inequitable to take from them what they have paid for.

The plaintiff, Kunkel, went to see Litchfield, the man who had the deed approved, on the 5th day of May, 1914 (Rec., p. 124), and at that time told Litchfield he would pay him \$550,000.00 cash for the property, but wanted about ten days' time. At that time he gave Litchfield a check for \$1,000.00. He then submitted the contract to his attorneys. He obtained the warranty deed on the 12th of May, following, and at that time paid the money. He stated that at the time he bought the property, and on the same day, the Prairie Oil and Gas Company took a lease on it. He said that there were no negotiations between him and the Prairie Oil and Gas Company with reference to the lease at the time he was negotiating with Litchfield. His examination then proceeded as follows (Rec., p. 129):

Q. "And were you not then trading the lease to them in case you bought it?

A. When I came upstairs Monday they had a directors' meeting below in the bank. I was down there with Litchfield. When I came up, Mr. C. H. Coonts was standing there and he said he was figuring on the property. I said, you are too late. He said, you are going to give us a chance to buy the property, we have done business, and I said, I am going to have ten days and I am going to take it to Chicago. He said, Mr. Moody will be here Wednesday, and O'Neal Tuesday, and asked me to wait until they came, which I did, and went down and looked at the property Saturday and came back Saturday night and had a directors' meeting and said they would give me five hundred and fifty thousand for the lease and include the wells. I told them I was going to keep the fee. Sold them the lease for the same amount I paid for the lease and the fee.

Q. Those negotiations took place before you got the deed, before this title was passed?

A. Then as they were figuring on it I went to the Prairie's attorney because if they were good enough for them they were good enough for me. They were the only attorneys I had in the transaction.

Q. And the first deed you took was a deed of special warranty?

A. That was executed on Tuesday 6th and brought over when the money was to be paid in the forenoon in the Prairie's office.

Q. And during that time the Prairie's attorneys had been examining the title?

A. No, sir.

Q. Want to get it straight—when did they examine the title?

A. On this Saturday night they closed up on Monday, the papers were in the First National Bank in escrow and Litchfield brought the papers over to the Prairie for their attorneys—that was on the 12th.

Q. He brought them over there and at that time did not have a general warranty deed?

The Court: Had you paid the money?

A. Yes, sir, paid the money at that day.

The Court: Did you have a general warranty deed before you paid the money?

A. No, sir, it was a special—called a special warranty deed before they agreed to give a warranty deed for it.

Q. You got a general warranty deed later?

A. I forget the time—

Q. Was it six days later—the special warranty made on the 6th and the general warranty on the 12th as a matter of fact?

A. Money was paid on the 12th and some little time after that the warranty deed.

Q. Warranty deed made sometime after the money was paid?

A. Yes, sir.

The Court: But at the time the money was paid it was understood they would execute a warranty deed?

A. Yes, sir.

Q. You took a lease from the Prairie?

The Court: The Prairie took a lease from him?

- A. 12th.
- Q. I mean the Prairie, the day you got the special warranty?
- A. The day I got the special warranty——
- Q. At that time the lease or land was making oil; it was producing oil?
- A. Yes, sir.
- Q. And the Prairie at that time demanded and requested you to give a bond to protect them so the oil from off-set wells?
- A. Absolutely not.
- Q. Never did?
- A. Never did.
- Q. Nothing of that sort occurred?
- A. No, sir.
- Q. How was this money paid?
- A. This five hundred and fifty thousand?
- Q. Yes.
- A. Paid by check of Prairie Oil and Gas Company to Litchfield.
- Q. The Prairie paid the check instead of giving the check to you and letting you turn it to them—they just transferred it direct?
- A. Yes, and we both signed the voucher for it."

It is perfectly clear from these statements that Kunkel *did not pay his own money for the land and had no intention of doing so*. The Prairie asked, so he says, a chance to buy the land and he told them he was going to have ten days and was going to take it to Chicago. He did not mean by this that he intended to take the land to Chicago, but he intended

to say that he was going to get someone in Chicago to take a lease and pay for the land. The record further shows that the check that was given for the lease, was *made out direct to Litchfield by the Prairie Oil and Gas Company*. While the record does not so state, there is every inference that Kunkel took down the \$1,000.00 check that he originally put up. Therefore, Kunkel, at least, has not been put in any worse attitude by reason of anything that happened. There are no facts upon which to raise an estoppel in his favor. If the woman gets back the royalty, Kunkel is just as well off as if no deed had ever been made him. A bona fide purchaser must pay a consideration. He has not paid any.

“One is not a purchaser for a valuable consideration unless he has parted with money or money’s worth in consideration of the conveyance, that is he must, as a consideration for the conveyance, have done some act by reason of which, if the conveyance were set aside, he would be in a worse pecuniary position than before.”

—Tiffany on Real Property, Sec. 574.

Citing: *Frey v. Clifford*, 44 Cal. 335; *Doss v. Armstrong*, 6 How. (Miss.) 258; *Strong v. Whybark*, 204 Mo. 341, 12 L. R. A. (N. S.) 240, 120 A. S. R. 710, 102 S. W. 968; *Ten Eyck v. Whitbeck*, 135 N. Y. 40, 31 A. S. R. 809, 31 N. E. 994; *Book v. Baines*, 23 Miss. 136.

“To entitle a grantee to protection as a *bona fide* purchaser, he must have paid the purchase money as well as have acquired the legal title without notice; notice before payment is effectual to deprive him of such protection, though he may at the time have acquired the legal title, and it is not sufficient that the purchaser may have secured the payment of the purchase money or may have paid a part of it.”

—Ruling Case Law, Sec. 468.

Paying a mere nominal consideration does not make a purchaser an innocent purchaser. *Parker v. Shannon*, 137 Ill. 376, 27 N. E. 525; *Ten Eyck v. Whitbeck*, 135 N. Y. 40, 31 N. E. 994; *Dunn v. Barnum*, 51 Fed. 355.

Kunkel was not buying the property with his own means. We think it is clear from the record that he never intended to do so. He was expecting someone else to advance the purchase money. He delivered the lease and the money was paid by the Prairie Oil and Gas Company as part of the same transaction, direct to Litchfield for the lease, or 7/8 interest in the oil and gas. Kunkel was not out anything and has never been out anything. There was no consideration ever moved from him to Litchfield, and as to the portion he retained, he is not and cannot be an innocent purchaser for value. Valuing the fee conveyed to Kunkel the way such interests are valued in oil transactions, it was worth more than one hundred thousand dollars. He paid no money for it and was out only the energy expended in making the

trade. If it was fraud for Litchfield to procure the attorney for this woman to go before the county judge, representing to the judge that he and the woman were getting \$2,000.00 apiece for the land, when at the time he was getting \$5,000.00 and thus deceived the court, then Kunkel is not in an attitude here where he can retain the property for which he paid nothing, obtained by this fraudulent scheme.

It is only where equities are equal that the law prevails, and in this case as to the fee in the land and the royalty interest, Kunkel has no equity at all.

A superior equity should be adjudged paramount to a legal title even when supported by an inferior equity. *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 50 L. ed. 499.

From the whole record, we believe this case should be reversed and decree rendered in favor of the appellants.

Respectfully submitted,

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Office Supreme Court, U. S.

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No. 134

In the
Supreme Court of the United States.
October Term, 1923.

**HANNAH CANARD BARNETT AND TUCKER K.
BARNETT, Appellants,
VERSUS
W. A. KUNKEL AND THE PRAIRIE OIL & GAS
COMPANY, Appellees.**

APPEAL FROM UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

Brief of Counsel for Appellees.

**THOMAS J. FLANNELLY,
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Counsel for Appellees.

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IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1923.

No. 134.

HANNAH CANARD BARNETT AND TUCKER K.
BARNETT, *Appellants*,

vs.

W. A. KUNKEL AND THE PRAIRIE OIL & GAS
COMPANY, *Appellees*.

APPEAL FROM UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF of COUNSEL for APPELLEES

The federal question assumed to be here involved is the construction of the Act of Congress of May 27, 1908, particularly section 9 thereof, which provides:

“That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee’s

land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the estate of said deceased allottee."

The propositions calling for a construction of the Act are:

First. That the deed of a full-blood Indian of the Five Civilized Tribes to lands inherited from an allottee thereof is void because made prior to the approval and recording of the patent to such allotment; and,

Second. That even if such lands are alienable prior to patent, the approval required by section 9, is void because made by the judge of the County Court at his residence, although the order of approval purports to be the act of the court and is duly recorded as such.

Two sections of the Act of Congress of April 26, 1906 (34 Stat. 144), are to be considered in this connection:

"*Sec. 5.* That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents here-

tofore issued, where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same: *Provided*, The provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of Interior at the date of the approval of this Act."

"*Sec. 22.* That the adult heir of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

I.

The first proposition has several times been the subject of judicial inquiry. We cannot do better than to quote from the opinion of the Circuit Court of Appeals on the first appeal in this case wherein it was said:

"It is argued that Hannah's deed to Simms was void. This contention rests upon the fact that the deed was executed two days before the patent for the land was issued, though the selection of the allotment had been legally made and approved long before. Section 19, of the Act of April 26, 1906 (34 Stat. 144, c. 1876), and section 5, of the Act of May 27, 1908 (35 Stat. 313, c. 199), render a deed of lands of the Five Civilized Tribes void, if made 'before the removal of restrictions therefrom.' It is argued through many pages that the land here was subject to restriction within the meaning of these laws, because the patent had not issued, and the land was therefore subject to the jurisdiction of the land department to cancel the selection for cause. This position is untenable, because the term 'restrictions,' as used in the Acts of 1906 and 1908, refers to prohibitions against alienation. The power of the Land Office to cancel a selection does not constitute a restriction within the meaning of these statutes. Section 22, of the Act of 1906, expressly provided:

'That the adult heirs of any deceased Indian of either of the Five Civilized Tribes *whose selection has been made*, or to whom a deed or patent has been issued for his or her share of the land of the tribe, * * * may sell and convey the lands inherited from such decedent.'

“Section 9, of the Act of 1908, also provides:

‘That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee’s land.’

“It has been the uniform holding that an allottee may convey the equitable title under a certificate of allotment, before patent, if the lands are not otherwise subject to restraint against alienation. *Thomason v. Wellman*, 206 Fed. 895, 124 C. C. A. 555; *Mullin v. United States*, 224 U. S. 458, 32 Sup. Ct. 544, 56 L. ed. 841; *Duncan Townsite Co., v. Lane*, 245 U. S. 308, 38 Sup. Ct. 99, 62 L. ed. 309. There is nothing in *Ballinger v. United States*, 216 U. S. 240, 30 Sup. Ct. 338, 54 L. ed. 464; *Skelton v. Dill*, 235 U. S. 206, 35 Sup. Ct. 60, 59 L. ed. 198; *United States v. Wildcat*, 244 U. S. 111, 37 Sup. Ct. 561, 61 L. ed. 1024; *Starr v. Long Jim*, 227 U. S. 613, 33 Sup. Ct. 358, 57 L. ed. 670; *Monson v. Simonson*, 231 U. S. 341, 34 Sup. Ct. 71, 58 L. ed. 260; *Franklin v. Lynch*, 233 U. S. 269, 34 Sup. Ct. 505, 58 L. ed. 954, or *Okla Oil Co. v. Bartlett*, 236 Fed. 495, 149 C. C. A. 540, or in any other of the numerous cases cited by counsel which, upon a reasonable interpretation, furnishes any foundation for the contention that the Simms deed was void because made before the patent of the land was issued.” 259 Fed. 398, 399.

But it is contended that section 22, of the Act of April 26, 1906, was repealed by section 9, of the Act of May 27, 1908. The contention seems to be based upon *Richard v. Parker*, 250 U. S. 235, and *Harris v. Bell*, 245 U. S. 103. The first of these cases held,

it is claimed, that section 9, merely relaxed but did not remove the restrictions against the alienation of lands in the hands of full-blood Indian heirs. Conceding that, how does it affect the right of conveyance with respect to whether or not the patent is approved, or the recognition by Congress in section 22, that such lands are alienable upon selection of the same as an allotment. Counsel virtually admit that a deed from the appellants prior to the Act of May 27, 1908, if approved by the Secretary of the Interior under section 22, would have been valid notwithstanding patent had not then been issued, and notwithstanding the existence of the very restrictions to which section 9 refers. *Harris v. Bell*, decided that a conveyance made by a full-blood Indian heir prior to the Act of May 27, 1908, must be approved by the Secretary of the Interior under section 22, of the Act of 1906, and that section 9, of the Act of 1908, contained no revocation of the Secretary's power to so approve, nor any provision inconsistent with its continued exercise as to prior conveyances. In this respect the court holds that the Act of May 27, 1908, was prospective, but that does not mean, as counsel seem to think, that all prior legislation was superseded.

An argument is made that under section 5 of the Act of 1906, the appellants had no title whatever to the lands purported to be conveyed on March 22, 1909, to the grantee, B. O. Simms. Section 5 of the Act of 1906, performs two functions. It directs all

allotments to issue in the name of the allottee, including among allottees those who may have died before the patent becomes effective, and providing that in such case the legal title so conveyed should inure to the benefit of the heirs. The words "patents hereafter issued" have not the significance claimed by counsel, but have reference to the former practice of issuing patents direct to the heirs, the section providing that all such patents, that is "patents heretofore issued," shall have the like effect. The second purpose of section 5 was to provide that the recording of the patents should operate without a prior delivery to, or acceptance by, the allottee or his heirs, to divest the legal title of the tribe and the reversionary interest of the United States, and in that respect modified section 23 of the original Creek Agreement (Act of March 1, 1901, 31 Stat. 861), which apparently contemplated a delivery and acceptance of patents to effect the partition of the tribal property. Such appears to have been the view of the Commission to the Five Civilized Tribes. See, *Lobay Major v. Lou Thompson*, a Creek allotment contest case, reported on page 183 of the Report of the Commission to the Five Civilized Tribes for the fiscal year ending June 30, 1904.

Under section 22, all inherited Indian lands were alienable by the adult heirs, the only modification being that the deeds of full-blood heirs should be approved by the Secretary of the Interior. The phrase "whose selection has been made" merely

requires that the lands to be conveyed must have been segregated from the tribal domain and set apart as an individual allotment. Even without such words there could be no estate subject to alienation until a particular, definite part of the communal lands was selected, for of course the right of selection itself could not be conveyed. But when such selection is made, evidenced by the allotment certificate, the right to a patent follows, and unless expressly prohibited, the land so selected is subject to alienation and is not conditioned upon issuance or recording of patent. As said by this court, in *Mullen v. United States*, 224 U. S. 457:

“It does not appear from the allegations of the bill whether patents for the lands had been issued to the Indian grantors before the conveyances were made. But as the lands had been duly allotted, the right to patent was established; and there was no restriction in cases under paragraph 22 upon alienation of the lands prior to the date of patent. There was undoubtedly a complete equitable interest which, in the absence of restriction, the owner could convey. *Doe v. Wilson*, 23 How. 457; *Crews v. Burcham*, 1 Black 352; *Jones v. Meehan*, 175 U. S. 1, 15-18. And any contention that the conveyances were invalid, solely because they were made before the issuance of patent—the lands not being under restriction—would be met by the proviso contained in section 19, of the Act of April 26, 1906, 34 Stat. 137, 144, c. 1876; ‘*Provided further*, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and

subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void'."

There is nothing in section 9, of the Act of 1908, which prohibits such alienation prior to the approval and recording of patents. That section relaxes rather than restricts the power of alienation then existing. True, as counsel observe, it changes the manner of approving the deeds of full-blood heirs in that the authority to approve is vested in the County Courts of Oklahoma instead of the Secretary of the Interior, as provided in section 22, but that is very far from a prohibition against alienation at all, or a limitation upon the power of the court to approve a deed until a patent has been issued, or if issued, until it has been approved and recorded.

Neither is there anything in section 5, of the Act of 1908, which operates to restrict the right of alienation of lands, duly selected, prior to the issuance or approval and recording of the patent. Similar restrictions for the protection of the Indian against improvident sales were contained in the

Creek Agreements (section 7, of the Act of March 1, 1901, 31 Stat. 861, and section 16, of the Act of June 30, 1902, 32 Stat. 500) and section 19, of the Act of April 26, 1906. Section 5, of the Act of 1908, has no reference to the restrictions on alienation in the hands of certain Indians according to degree of blood. There is not, and never has been, any classification for the purpose of restrictions against alienation, based on the question of whether or not a patent has been issued, approved or recorded. As we have said, it is conceded by counsel that the appellants could have conveyed these lands prior to the Act of May 27, 1908, and we can find nothing in that act which can be interpreted as imposing the limitation here contended for.

It is perhaps unnecessary, in view of what we have already said, to notice the contention that when the legal title did pass by virtue of the recording of the patent, it was an after-acquired title which did not inure to the grantee of the appellants. There was no after-acquired title within the meaning of the decisions cited by counsel. The cases cited involve the attempted conveyance of allotted lands within the period of restrictions. All that these cases decide is that the doctrine of conveyance with covenants of warranty which estops the grantor to deny the title of his grantee, does not apply to the case of a conveyance made contrary to public policy or statutory prohibition. The case of *Okla Oil Company v. Bartlett*, 263 Fed. 488, cited by counsel, holds

only that the doctrine of estoppel cannot be invoked against an Indian grantor whose deed has not been approved by the court, and according to the methods prescribed by statute. That the land was restricted in the hands of Hannah Canard Barnett as the heir of the allottee Mahaley Watson in the sense that her deed was valid and effective only if approved by the County Court, is, of course, not disputed, but that is an entirely different and distinct question.

The allotment having been duly selected on behalf of Mahaley Watson, the allottee, the certificate therefor having been issued to her prior to her death, she thereby became vested with the equitable title, and Hannah Canard Barnett as her heir, had the right, at any time subsequent to April 26, 1906, to convey the lands embraced in said certificate, provided her deed was approved by the proper authority, that is by the Secretary of the Interior if made prior to May 27, 1908, and by the proper County Court of Oklahoma if made after that date. Her deed was executed March 22, 1909, and the real question in this case, and upon which this court has not heretofore been called upon to pass an opinion, is whether the County Court of Okfuskee County, Oklahoma, conceded to be the proper court, approved her deed.

II.

The deed to B. O. Simms, and under which the appellees claim, was first approved by the County Court of Hughes County, but because of a doubt as to the jurisdiction of that court, it was afterwards approved by the County Court of Okfuskee County, which is conceded to have been the proper court to approve the deed.

It is the contention of appellants that the approval of a deed to Indian lands by full-blood heirs under section 9, of the Act of May 27, 1908, must be made (a) in open court, (b) at a regular session or term of the court, (c) at a designated place, and (d) with all the formalities of a judicial hearing, otherwise it is void.

(a) In Open Court.

The Act of Congress simply provides for the approval of such deeds by the County Court having jurisdiction of the settlement of the estate of the deceased allottee. No procedure is prescribed, and it must be assumed that Congress left the procedure to be governed by such rules, practice or regulations as the court might see fit to adopt, or the statute prescribe. If we consult the statute, we find that over and over again the word "judge" and the word "court" are used interchangeably. Following the procedure for the administration of an estate, we find that a petition for the appointment of an administrator is filed with the "judge" and such

"judge" must set a day for the hearing. (Section 6251, Revised Laws of 1910.) If any person contests the petition, the "judge" shall set a day for the hearing of the same (6251). If letters are granted to a person, other than those preferred by the statute, any one of the latter class may present to the "court" a petition (6258), and the "judge" may issue a citation (6274). The "judge" may suspend the powers of an administrator (6276). The "judge" approves the bonds of administrators and executors, and may require additional security upon application therefor, by issuing notice and citation for that purpose (6269). Section 6492, provides that all citations, while issued by the "judge," must be under the seal of the "court." The "court" is required to examine all bonds of executors and administrators once a year, and make diligent inquiry as to the solvency of the sureties, and the "court" shall demand further security if the security be insufficient (6276). Section 6276, provides that the "judge," without an application, may issue a notice to an administrator to show cause why he should not give a new bond. All applications for the giving of new sureties may be heard and determined *at any time*, and must be entered on the *minutes of the court*. When there is delay in granting letters, the "judge" can appoint a special administrator, and the "judge" must issue the letters in conformity with the *order* in the minutes (6280-82). In case an administrator embezzles property of an estate, the "judge" must

by an order entered upon *minutes of the "court"*, suspend the powers of such administrator (6296). Claims against an estate must be presented to the "judge" for allowance (6342). Real estate may be mortgaged by executors or administrators by an *order* of the "county judge" (6354). In making sales for the payment of debts of such articles as are not necessary for the support of the family of the decedent, the orders may be made by the "court" or "judge" (6369). A petition for the sale of realty belonging to an estate, may be presented in the County Court or to the "judge," and if such sale appears necessary, an order is then made by the "court" or "judge," directing a hearing (6373). The "court" orders the sale (6378), and the land may be sold in one parcel or in subdivisions, as the "judge" may deem most beneficial (6379) and if a part of the land has been devised by will, the "court" must order the remainder sold first (6379). Objections to the confirmation of sale may be heard by the "court" or "judge" (6387), and the "court" confirms the sale (6388). In the matter of the final settlement of estates, the "judge" fixes a date for the hearing (6440) and the "court" postpones the day of hearing (6441). Section 6489, provides that all orders and decrees of the "court" must be entered in the minute book of the court. In the article on appeals, appeals are provided for from an judgment, decree or order of the "court" in a probate cause or of the "judge" thereof (6501). See

tion 1823, provides that a County Court shall always be open and in session for the transaction of all probate business.

We think we are justified in the conclusion that, practically, the "judge" and "court" are made up of one and the same functionary, and the powers of one are blended with the other. This was the ruling of the Supreme Court of Iowa in *Lee County v. Nelson*, 4 Green, 348, in construing a statute very similar to the Oklahoma statute. It was there said:

"The county judge and the County Court, are one and the same thing. All the powers and duties devolving upon the one may be exercised by the other. This is obviously contemplated by the Code, in declaring that 'The County Courts shall be considered in law as always open' par. 125. The 5th, 6th, and 7th divisions of par. 106, direct the 'county judge' about keeping 'minute books,' 'road book,' 'separate books for the probate business' and the 'warrant book.' Section 128, makes these very books 'constitute the records of the county.' The only books that are to be kept separate from the other business of the county are the probate records, par. 139. By other sections the County Court is authorized in various ways to act ministerially. All official acts of the county judges, then, are acts of the County Courts, whether judicial or ministerial; and so far as jurisdiction goes, county judge and County Court are convertible terms. All decrees and decisions made by the county judge are, in fact and legal effect, the decisions and decrees of the County Court; and from all such decisions, both

ministerial and judicial, an appeal is allowed under par. 131; and when a party entitled to an appeal fails, without fault on his part, he may apply to the District Court, which may authorize the appeal to be taken, par. 134."

By an Act of Congress of May 3, 1891, it was provided:

"That, in addition to the jurisdiction granted to the probate courts and the judges thereof, in Oklahoma Territory, by legislative enactments, which enactments are hereby ratified, the probate judges of said Territory are hereby granted such jurisdiction in townsite matters and under such regulations as are provided under the laws of the State of Kansas."

It was held by the Supreme Court of Oklahoma Territory, in *Finley v. Territory*, 73 Pac. 273, that this was a power conferred upon the office and not upon the individual, and after discussing jurisdiction and procedure of the probate courts under the statute, concluded that the act simply conferred additional power and jurisdiction upon the probate courts of the Territory. Here, also, we think, is authority for the conclusion that "judge" and a "court" are made up of one and the same functionary.

In *Mullen v. Short*, 133 Pac. 230, it is said:

"Congress undoubtedly, in passing section 9, of the Act of May 27, 1908, had in mind the meaning that is ordinarily given to the general language of our statute which confers probate

jurisdiction upon the County Courts, and used the words 'having jurisdiction of the settlement of estates of said deceased allottees' in the same broad sense. Congress was not now creating a court which should have jurisdiction over such estates. Such a court had been created by the Constitution and laws of the state."

What Congress undoubtedly meant was that the judge of the probate court should act officially in the manner prescribed by local law, upon a petition or some proceeding which should invoke the jurisdiction, and that the evidence of the exercise of that jurisdiction should be preserved, the manner and form of which being left to local law or practice. The usual order of approval signed by the judge and made a matter of record or entered upon the minutes of the court, is as much an order of the probate court, as the acts and orders of a "judge," entered upon the minutes of the court in probate procedure. Whether it is called judicial or ministerial, it is an order of the court within the meaning of the statute, and no more subject to collateral attack than would be the appointment, by the judge, of a special administrator, actually made at his home, but entered upon the minutes of the court.

(b) At a Regular Session or Term.

It is contended that the County Court was not in session on June 17, 1913, but had adjourned on May 20, 1913, and did not convene again until Oc-

tober 6th. Section 1823, Revised Laws of 1910, provides:

"In each county, commencing on the first Mondays of January, April, July and October of each year, except as otherwise provided, County Courts shall convene at the county seat and continue in session so long as business may require; *Provided*, that said courts shall always be open and in session for the transaction of all probate business in their respective counties."

Reference is here made, unquestionably, to the terms of the County Court for civil business on the law side of the court, and this is clearly evident from the last clause of the section, providing that such courts shall always be open and in session for the transaction of all probate business. This clearly means that official probate business may be transacted even when the court is not "open" or in session, and that such business may be done, at any time, with the same validity and effect as though done while the judge is on the bench.

(c) At a Designated Place.

There is no express provision in our statute for the holding of a county court, sitting in probate, at any particular place. All that the statute provides is that the judge of the County Court shall keep his office at the county seat, in such rooms as the county may provide, and his office shall be kept open at reasonable hours (1828). Even a solemn, formal judgment of a County Court can-

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not be attacked upon the ground that it was rendered at a place different from that which might be provided by law. In *Black on Judgments*, section 177, it is said:

“In regard to the place of holding a court, compliance with the law is, of course, important, and perhaps essential to the perfect validity of the judgment rendered, but it does not appear from the authorities to be so indispensable that deviation from the law in this respect will of itself be sufficient to render such judgment absolutely void.”

In the case of *Grange v. Ward*, 11 Ohio Rep. 258, it was held that the probate of a will taken within the county at a place other than the county seat was competent evidence to establish the will. The court held that there was no positive statute requiring the court to convene at the county seat, and that in any case, if a court has jurisdiction over the subject-matter, its acts and adjudications would not be void, although they might be erroneous, because not heard at the county seat.

In *Gage v. Downey*, 21 Pac. 527, the Supreme Court of California held that where a case was transferred because of the disqualification of the judge to an adjoining county, under authority of a statute which required the case to be transferred to an adjoining county, the fact that the county to which the case was transferred was not an adjoining county did not render the judgment void nor subject to collateral attack.

In *Harrison v. German American Fire Insurance Company*, 90 Fed. 758, the federal court for the Eastern District of Iowa, held that a motion for a new trial, decided at a time when the court was not in session at all, was not void. Other cases have held that where a matter has been heard and argued in open court during the term, a decision might be filed after the term. It was so held in *Calhoun v. Port Royal and W. C. R. R. Co.*, 20 S. E. 30, and, also, in *Comstock Quick-Silver Mining Company v. Superior Court of Santa Cruz County*, 57 Cal. 625.

In *Greenwalt v. Mueller*, 59 Pac. 137, it was held that there was no irregularity in the trial judge making and signing his decision and decree in the case in a county other than that in which the trial was heard.

In *Van Fleet's Collateral Attack*, paragraph 574, it is said, with reference to the place of holding court:

“A person was tried and convicted in Georgia, and this was affirmed in the Supreme Court. He then brought *habeas corpus* proceedings and sought to contradict the record, which appeared regular on its face, by showing that his trial was had in the basement of the court house before a special judge, while the regular judge and jury were engaged in another cause in the court room, but it was held that he could not do so. Of course, the affirmance by the Supreme Court added nothing to the power of the trial court. So, where a judgment by confes-

sion appeared regularly upon the record as of January 14, it was held that another creditor could not show that the order for the entry was made on the papers by the judge at his residence, at ten o'clock that night, and that no court was in session on the 14th. So, in an English case, where an order of commitment by the master of the rolls was regular on its face, it was decided that it could not be shown on *habeas corpus* that it was made out of court. Lord Chief Justice DENMAN, in speaking of the place where the master made the order, said: 'I think, therefore, that affidavits to show where he was actually sitting for the purpose of this objection, would be of no avail. The order states that the prisoner was brought to the bar of the court. Suppose affidavits were offered to show that the master of the rolls made his order elsewhere than in the place where the court usually sits; they could not be received for the purpose of proving that what he adjudged to be the bar of his court was not so. The adjudication of any competent authority, deciding on facts which are necessary to give it jurisdiction, is sufficient. * * * Here we are concluded by his decision on the fact necessary to his decision, giving the same credit to him that we should give to the humblest minister of the law. When the master of the rolls pronounces the bar of his court, that is an adjudication which we must credit and hold conclusive'."

Where a justice of the peace of one township sat and tried a case in another township, even without the consent of the parties, the judgment was held not void, and that it was not competent in a

collateral proceeding to disprove the existence of jurisdictions shown on the face of the judgment.

—*Gregory v. Bovier*, 19 Pac. 232.

It was held in *Cheatham v. Brien*, (40 Tenn.) 3 Head, 552, that a judgment of a justice rendered four miles away from his office, but within his jurisdiction, is valid.

In *Sowell v. Ridlon*, 5 Me. 458, it was held that, where the statute provided that in a partition suit, if an answer were filed, the trial should be in the county where the land lay, a trial in another county was not void.

(d) With All the Formalities of a Judicial Hearing.

In view of the discussion under (a), it would not seem necessary that the order approving a deed of inherited land be done with such formality as appears to be insisted on. If such be the case, then it is somewhat anomalous to require such order to be hedged about with all the sanctions of a formal judgment, and yet, to deny to it the status and effect of a formal judgment, so as to place it beyond collateral attack.

The whole question is reduced to what appears to be a splitting of hairs, for it is nothing less than to say that an order of approval is good, if done at a certain place, although that is not expressly designated by statute, but utterly void, if done with the same formality, twenty feet across the

street, for instance, by the same functionary, the evidence of which is preserved in the same manner, and which proceeding is attended by all the parties in interest without objection, and whose rights can in no possible way be affected.

The question was before the Circuit Court of Appeals in *United States v. Black*, 247 Fed. 942. In that case the deed of a full-blood Indian heir was approved by an order of the county judge of Hughes County, Oklahoma, signed by him in Hughes County, but not at the county seat, and subsequently entered of record in the County Court. With reference to the validity of such approval the court said:

“The laws of Oklahoma then in force, but subsequently embraced in the Revised Laws of Oklahoma, provide as follows:

‘Sec. 1823. In each county, commencing on the first Mondays of January, April, July and October of each year, except as otherwise herein provided, County Courts shall convene at the county seat and continue in session so long as business may require: *Provided*, that said courts shall always be open and in session for the transaction of all probate business in their respective counties.’

“This court is always open for the trial of those cases triable under justice of the peace procedure and for the purpose of taking and entering judgments by confession. *Wilson v. State*, 3 Okl. Cr. 714, 109 Pac. 289. The mere name ‘County Court’ conveys but little as to

its jurisdiction. In many states such courts exercise the taxing power, and in many exercise or did exercise the functions now generally intrusted to boards of supervisors or commissioners, and substantially all exercise limited judicial functions.

“It must be borne in mind that ‘the court having jurisdiction of the settlement of the estate’ of Sam Lucas was always in session. We have no desire to conflict with, much less to overrule, those cases which draw a correct distinction between a court and the judge thereof, and limit the power of courts to act in vacation; but the law says there shall be no vacation in the County Court in probate matters, consequently the ‘court having jurisdiction of the settlement of the estate’ of Sam Lucas is always in session. Where? At the county seat or some court seat where there is no judge, or where the judge is, although it be away from the county seat or some court seat? We have concluded the latter is meant, and that this deed was approved by the County Court when the county judge approved it within the county, and especially so where the order is subsequently entered of record at a court seat, which we understand was done here. We therefore conclude the approval of the deed to Turner at Atwood was valid. See, *Lee County v. Nelson*, (Iowa) 4 G. Greene 348.”

Upon the first appeal of the case at bar to the Circuit Court of Appeals it was said on this point:

“A more serious contention is that the order of the county judge approving the Simms deed was void; (a) Because made at the home

of the judge, instead of the court house; (b) because the terms of the County Court for Okfuskee County had been adjourned, and the adjournment entered upon its records, prior to the approval of the deed, and no other terms had been legally called, so the order was entered in vacation. Both of these questions were before this court in *United States v. Black*, 247 Fed. 942, 160 C. C. A. 132, and the decision is conceded to have been against defendants' present contention. We have examined the authorities cited by counsel carefully, and considered their argument, and find no sufficient reason for modifying our former decision. It is true that there is some language in the decisions of the Supreme Court of Oklahoma tending to show that a judge cannot act judicially, except in the place officially established for holding his office, and that his act in vacation is not the act of the court. The cases most nearly in point are *MaHarry v. Eatman*, 29 Okl. 46, 116 Pac. 935 (which seems to be qualified in *Campbell v. Dick*, 157 Pac. 1062), and *Eischoff v. Caldwell*, 51 Okl. 207, 151 Pac. 860, L. E. A. 1917-E, 359. These were cited and fully considered in the *Black* case. There is no decision, however, of the highest court of the state, ruling that the act of a County Judge in vacation, in a case like this, is not the act of the court, or that his act outside of the courthouse is void. The local statute declares that for many purposes county courts shall be deemed to be always open. As to matters which do not require the presence of a jury, the distinction between the judge and the court is formal. It is the common practice of American judges, sitting at *nisi prius*, to hear argu-

ments, and make orders, and judgments, without the presence of their clerk or executive officer. Such orders and judgments, when filed with the clerk and entered upon the court's record, are treated precisely as if the clerk had been present at the time of the argument, and heard the order orally, or received it as signed from the hand of the judge. The rule which counsel urges would greatly hamper judicial administration, without any compensating security to the public. We recognize that a decision of the highest court of a state, defining the powers of an inferior court under the local statute and constitution and laws, would be binding upon this court. We further recognize that such a decision, determining when an order approving a deed of real property in the state is sufficient to give the deed full validity, would constitute a rule of real property, and would probably be binding upon a federal court sitting in the state. No such decision, however, has been called to our attention as to the specific question here involved, and we therefore can discover no adequate reason for modifying our decision in *United States v. Black*."

—*Barnett v. Kunkel, supra*, pp. 399, 400.

On the first trial of the case the court excluded the evidence offered as to the signing of the deed by the County Judge at his home. The objection to the introduction of such proof was that the order of a County Court approving the deed of a full blood heir appearing of record in court when the order was made, could not be impeached by evidence that it was signed by the Judge of the court at a place other

than the court room; that a court speaks alone by its record, and that the order could not be impeached as a nullity except by showing that the court was without jurisdiction; that the proof of the adjournment of the court referred only to the law term and that for the transaction of probate business a court does not adjourn from term to term, but is always open; and that the acts of probate judge are the acts of the court, provided a minute or record was made of the proceedings and that the judge acted officially in the premises.

The record, as now made, shows that Judge SMITH, the County Judge of Okfuskee County, while sick at his home, heard the application for the approval of the deed; that the appellants were both present and examined by him; that he had an agent of the Interior Department investigate the value of the land; that he sent to the office of the court clerk for the seal of the court and that he signed the order of approval and affixed the seal thereto; that he caused the order so signed to be delivered, together with the application of appellants for the approval of the deed, to the clerk of the court and that the latter immediately entered upon his journal the filing of the application and the order of approval and had the latter copied into a book or record kept for that purpose.

The order of approval recites:

“The court finds that on the 22nd day of March, 1909, said Hannah Canard made, exe-

cuted and delivered a warranty deed conveying the real estate above mentioned to B. O. Simms, and that on said day she presented said deed, together with her petition, asking for the approval thereof, to the County Court of Hughes County, Oklahoma, stating and alleging in her said petition, that the above mentioned Mahaley Watson died in Hughes County, Oklahoma, instead of in Okfuskee County, Oklahoma; that upon said petition and upon the sworn testimony offered in support thereof, the said deed was by the County Court of Hughes County, Oklahoma, duly approved on said 22nd day of March, 1909.

“The court finds that since the approval of said deed by the County Court of Hughes County, Oklahoma, that these petitioners have learned that Mahaley Watson died in Okfuskee County, Oklahoma, and not Hughes County, Oklahoma, and that they present said deed, together with their petition, herein mentioned, to this court, asking that said deed be by this court approved and the sale confirmed.

“The court finds that there has been an additional consideration paid to said grantees amounting to \$2,000.00, which the court finds has been paid to them on this date in money.

“The court also finds that said consideration is reasonably fair and just, and that it is to the best interests of all parties concerned, that said deed be approved and the sale ratified and confirmed.

“It is therefore, hereby considered, ordered and adjudged and decreed by this court that the said warranty deed bearing date of March 22, 1909, executed by Hannah Canard to B. O.

Simms, and conveying to the said B. O. Simms, the real estate herein mentioned, be and the same hereby is in all things ratified, approved and confirmed.

“Witness my hand and official seal, on this the 17th day of May, 1913.”

The order, therefore, speaks for itself and proclaims that it is the judgment of the court and not the private act of the judge. The clerk, under the seal of the court, certifies that the order was entered of record and appears on probate record No. 2 of the County Court, at page 384, which record is in his custody.

It is argued that the approval of a deed of inherited Indian land is not a probate matter within the meaning of the constitution and laws of Oklahoma. We do not so contend, but as section 9 provides for the approval of such deeds by the County Court “having jurisdiction of the settlement of the deceased allottee’s estate” it can act only in its probate capacity, for only in that capacity could it have jurisdiction to administer upon the estates of decedents. The Supreme Court of Oklahoma in *Snell v. Canard*, has taken substantially that view of the question. A copy of the opinion in that case is attached as an appendix to the brief of counsel for appellants.

It is also contended that approval of the deed was void because made four years after it was executed. With respect to that contention we think the

Circuit Court of Appeals properly disposed of it in the following language:

“It is urged that the approval of the Simms deed by the County Court of Okfuskee County, was void, because the deed itself was executed in 1909, and the approval was not made until 1913. The mere running of time, however, did not destroy the original deed, nor take away the power of the court to approve it. It simply rendered more difficult the investigation which the court ought to make before such approval. The act of a approval is administrative. It contemplates that there shall be such an inquiry as satisfies the court that the making of the deed at the time of its execution, and upon the consideration then paid, is just and equitable, and for the best interest of the grantor. In a field where values are rapidly changing as in western Oklahoma, the passage of four years' time increases the difficulty of such an inquiry, and ought to make the court much more cautious in awarding approval than when the deed is promptly presented. Mere lapse of time, however, does not destroy the deed or take away the power to approve it. *Lomax v. Pickering*, 173 U. S. 26, 19 Sup. Ct. 416, 43 L. ed. 601; *Lykins v. McGrath*, 184 U. S. 169, 22 Sup. Ct. 450, 46 L. ed. 485.”

—*Barnett v. Kunkel*, 259 Fed. 399.

It was also contended that there was no legal evidence of the court's approval of the Simms deed and that the court committed error in allowing the evidence to be offered by the appellees on that point. The original order of approval signed by Judge Smith was shown to have been lost, at least the court

clerk in whose custody it should have been, testified that there had been a search for it without success and that he did not know what had become of it. Appellees showed by a witness, J. P. Patterson, that he was present in Judge Smith's home when he signed the order of approval; that the judge had telephoned to the clerk's office for some one to bring the court seal so that it might be affixed to the order and that the witness took the order to the clerk's office.

Matt Dossey, the court clerk on June 17, 1913, says he saw the original order and that it was signed and sealed and that it bore the signature of Judge Smith, which signature he knew, and that on the same day on which the order was made he made the following entries on his journal:

“Hannah Canard Barnett and Tucker K. Barnett, to B. O. Simms, No. 755.

“June 17, Petition for approval of ‘Warranty Deed’ on the following described real estate, to-wit:

“N2 of N2 of Sec. 21, Twp. 17 Rge. 7 East for a consideration of \$2,000.00 additional to \$500.00 paid at time deed was approved in Hughes County from same parties.

“June 17. Order approving deed filed June 17th, 1913.

(Above from page 391, Land Approval Fee Record No. L. Okfuskee County, Oklahoma).”

The witness also testified that the order itself was entered by his deputy under his supervision in

what is known as Full Blood Approval Record No. 2, pages 384 and 385, and which was offered in evidence.

There is, it is true, no statute, either state or federal, which provides for or requires the recording of these orders of approval. But do counsel mean to contend seriously that because of that fact the original order of approval is the exclusive evidence of the court's action in the premises? If the approval of such deed cannot be proved in the manner employed in the present case, then how can it be proved? By the parole testimony of the judge himself? But suppose he is dead, as is the fact here, is it then incapable of proof? Congress, in requiring the approval to be by court, must have contemplated that some record of the approval should be kept and preserved. A record was in fact kept by the clerk of the court and evidently with the sanction and approval of the court itself. That record, or a certified copy thereof, is certainly legal evidence; and appellees introduced both the record made by the clerk at the time and a copy certified by the present custodian of the record, in addition to proving the actual making of the order and its execution by the judge.

Counsel quote section 5099 of the Revised Laws of Oklahoma of 1910, which provides:

“Copies of all papers authorized or required by law to be filed or recorded in public office or of any record required by law to be

made or kept in any such office, duly certified by the officer having legal custody of such paper or record under his official seal, if he have one, may be received in evidence with the same effect as the original, when such original is not in the possession or under the control of, the party desiring to use the same."

It is not clear how counsel can invoke this statute and at the same time insist that the order of approval is not such paper as the statute contemplates. If the order is not authorized or required by law to be filed or recorded in any public office, then the statute relied upon can have no application. The order of approval in this case, being a public document, would never have been in the possession or control of the appellees.

It is finally contended by counsel that the approval of the deed to B. O. Simms was obtained by fraud, deceit and misconduct on the part of George C. Crump, an attorney employed by Hannah Canard Barnett to recover the land, and is therefore void, even in the hands of the appellees who assert that they are bona fide purchasers. This question we think is disposed of by the rule often announced in this court that where two courts have reached the same conclusion on a question of fact, the finding will not be disturbed if there is any conflict in the testimony.

—*Baker v. Cummings*, 169 U. S. 189;

Stuart v. Hayden, 169 U. S. 1;

Towson v. Moore, 173 U. S. 17;

Beyer v. LeFevre, 186 U. S. 114.

The rule announced in these decisions is not affected by the statute quoted by counsel, *viz.*:

“In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.”

If this section has application to the case at bar both the District Court and the Circuit Court of Appeals found that there was in fact no fraud in the procuring of the deed.

Respectfully submitted,

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